TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1967

No. 55

THOMAS EARL SIMMONS, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1967.
CERTIORARI GRANTED JUNE 12, 1967

SUPREME COURT OF THE UNITED STATES

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

15223, 24, 25

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

WILLIAM EARL ANDREWS, THOMAS EARL SIMMONS, and ROBERT JAMES GARRETT, Defendant-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Honorable Bernard M. Decker, District Judge.

Appendix—Filed December 8, 1966

Philip Ginsburg, 122 South Michigan Avenue, Chicago, Illinois, 60603.
Doris A. Coonrod, 30 North LaSalle Street, Chicago, Illinois, 60602.
Raymond J. Smith, 105 West adams Street, Chicago, Illinois, 60603.

[File endorsement omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

No. 64 Cr 134

INDICTMENT—Filed March 3, 1964

The March 1964 Grand Jury charges:

That on or about February 27, 1964, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, William Earl Andrews, Thomas Earl Simmons, and Robert

James Garrett, defendants herein, did by force, violence and intimidation, unlawfully, knowingly and wilfully take from the presence of employees of a savings and loan association, to wit, the Ben Franklin Savings and Loan Association, 4812 S. Pulaski Avenue, Chicago, Illinois; which said Ben Franklin Savings and Loan Association was then and there a savings and loan association, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation under Certificate No. 3642, a sum of money, to wit, approximately One Thousand Five Hundred and Eighty-One Dollars ($1,581.00), which money was then and there in the care, custody, control, management and possession of the aforesaid Ben Franklin Savings and Loan; in violation of Section 2113, Tit 12 18, United States Code.

Count Two

The March 1964 Grand Jury further charges:

That in committing the offense hereinbefore described, the said defendants,

[fol. 2] William Earl Andrews, Thomas Earl Simmons, and Robert James Garrett, defendants herein, did put in jeopardy the lives of employees of the aforesaid Ben Franklin Savings and Loan Association by the use of dangerous weapons, to wit, firearms, all in violation of Section 2113, Title 18, United States Code.

A True Bill:

* * * * * * *

William Andrews Petition for Severance.

* * * * * * *

Robert James Garrett's Motion for return of seized property.

* * * * * * *

Amended motion for return for seized property filed.

Transcript of Proceedings—February 16, 1965

MARY RUTH REY called as a witness on behalf of the government testified as follows:

Direct examination.

By Mr. Dunne:

* * * * * * *

Q I live at 5129 South Halsted, and I am the sister of defendant William Earl Andrews.

(Whereupon the witness identified William Earl Andrews in open Court.)

I know the defendant, Thomas Earl Simmons, and he [fol. 3] is my brother-in-law.

(Whereupon the witness identified Thomas Earl Simmons.)

Both Simmons and Andrews lived in Pulaski, Tennessee, during the year 1964. My mother, Mary Ellen Mahon, lives at 848 West 51st. Place with my stepfather and my grandfather.

On February 27, 1964, I was in the hospital in Chicago, I own a 1960 Thunderbird, and it has a scrape on the lower right hand panel of the passenger side.

(Whereupon the witness identified government's exhibits 1-A and 1-B as pictures of the car showing the scrape.)

I usually park the car at 5129 South Halsted, about a half block from my residence. My brother, the defendant Andrews, called me at the hospital on February 27, 1964, and asked to borrow my 1960 Thunderbird.

* * * * * * *

HELEN SCAPARDINE called as a witness on behalf of the government testified as follows:

Direct examination.

By Mr. Dunne:

I am a housewife, and I reside at 11816 South Peoria. On February 27, 1964, I was working at the Tower Lake News Agency.

I know Mary Ruth Rey. I arrived at work on February 27, 1964, at about 11:30 or quarter to twelve, and received a telephone call from Mary Ruth Rey. After the call, William Earl Andrews came into the news agency and we had a conversation.

[fol. 4] (Whereupon the witness identified William Earl Andrews in open court.)

Andrews told me that Mary Ruth Rey told him he could borrow the car, and I gave him the keys. Mary Ruth Rey owns a 1960 White Thunderbird with a long scratch on the side of it.

(Whereupon the witness identified government's exhibits 1-A and 1-B as pictures of that car.)

I was using the car while she was in the hospital. I saw Andrews again later that same day about two or 3:30 p.m. when he came into the news agency and returned the keys.

Cross examination.

By Mr. Smith:

My employer in the Tower Lake News Agency is Joseph Franz. Franz has occasion to drive Mary Ruth Rey's Thunderbird, but he was not using it during the period of February, 1964. Franz also has a 1959 or 1960 white Rambler. I was substituting for Mary Ruth Rey while she was in the hospital.

"By Mr. Smith:"

"Q. Were you present later in the day of February 27, 1964, at that office, that Tower News Agency?"

"A. Yes."

"Q. At any time did the police arrive at Tower News Agency?"

"A. Yes."

"Q. Was Joseph Franz questioned concerning the car?"

"A. He was."

"Q. Was he taken into custody?"

"Mr. Dunne: Objection, your Honor."

[fol. 5] "The Court: I will sustain your objection."

• • • • • • •

By Mr. Smith:

"Q. Do you know who Joseph Franz was questioned by?"

"Mr. Dunne: Objection."

"The Court: I will sustain this entire line of objections."

• • • • • • •

Cross examination.

By Miss Coonrod:

When Andrews came to pick up the car, it was parked in front of the news agency.

I did not see where the car was parked after Andrews returned it until the FBI men came to the news agency. Earl Andrews did not tell me where he had parked the car.

The FBI took a statement from me.

The last time I saw it was when Mr. Dunne came to my house on February 3. At that time Mr. Dunne and I talked about the testimony I would give in this trial. Mr. Dunne allowed me to read the statement I had previously given to the FBI.

There was one set of keys for the Thunderbird. I had been using the car for a couple of days while Mary Ruth Rey was in the hospital.

* * * * * * *

PHILLIP EDWARD MAZAIKA called as a witness on behalf of the Government testified as follows:

Direct examination.

By Mr. Dunne:

I live at 5959 West 127th. Street, Palos Heights, and I am employed at Commonwealth Edison's Will county Station.

[fol. 6] On February 27, 1964, I was working at Ben Franklin Savings and Loan Association, 4812 South Pulaski, as a part-time teller. At about 1:45 that afternoon, I was typing behind one of the teller's windows.

I had my back to the window. I heard the buzzer to let people come in and I heard a man say, "I want a money order."

"Q. Was there anything unusual about the voice?"

"A. Well, I—"

"Mr. Smith: I object to something unusual about his voice."

"The Court: Objection overruled."

By the Witness:

"A. I noticed he had a southern accent."

By Mr. Dunne:

"Q. What did you do after you heard the voice with the southern accent say, 'I want a money order'?"

"A. I mentioned to the girl that was working next to me that he wants a money order and he gave it in a southern accent and—"

"Miss Coonrod: Your Honor, I object to all of this conversation."

"The Court: I will sustain the objection as to the conversation."

"Mr. Dunne: Your Honor, I ask you reserve your ruling subject to it being connected up."

"The Court: This is a conversation that—"

"Mr. Dunne: I ask that you reserve it for two more questions.

[fol. 7] "The Court: All right.

* * * * * * *

The man had a gun in his hand and it was cocked.

(Whereupon the witness identified the man with the cocked gun as Thomas Earl Simmons.)

As they were leaving I noticed that another man had been waiting in the corner of the bank. I could not positively identify that other man. I waited a few seconds after they left the bank.

I ran north on Pulaski. I recognized one of the men in the passenger side of a car. It was the same man that had the gun. The one I identified as Thomas Earl Simmons.

"Q. What kind of a car was he riding in?"

"A. I guess it would be about a 1960 Thunderbird, white, two-door."

I could not recognize the driver of the car. I could not tell if there was anybody in the back seat. The Thunderbird was dirty and had a big scrape along the passenger side on the door. I was unable to get the license number of the car.

(Whereupon the witness identified Government's exhibits 1-A and 1-B as pictures of the car.)

I got back to the bank about two o'clock. Later I talked to agents of the FBI and officers of the Chicago Police Department.

Cross examination.

By Mr. Smith:

When I ran out of the bank, the car was to my left; that is, if I turned and faced the same way the car was going it would have been on my left.

I was closer to the passenger side. I was present in court this morning with agents of the F.B.I. Two of the [fol. 8] defendants were present at that time. I had never been to the Federal Building before this morning.

I never observed the defendants at any other court hearing or proceeding. On the day of the robbery, I stayed at the bank after quitting time until about 6 or 6:30. The agents interviewed me concerning the robbery. I was shown snapshots, but I cannot remember if it was the day of the robbery or the next day.

The F.B.I. agents came to the bank to show us the snapshots. We viewed the pictures in the lobby at the front of the bank. Others at the bank looked at the pictures before me. We were not together when we looked at the pictures.

Of the five or six snapshots which they showed me, one of them was larger. The others measured about four by six inches. I spent two and a half years in Fort Benning, Georgia, in the Army. Four employees were in the front of the bank when I heard someone say, "I want a traveler's check."

There were no customers present, but there were more employees in the rear room of the bank. To get inside the bank, a person has to push the button at the outside door, and we press a buzzer which opens the door electrically.

There is no guard in the bank. There are several rooms in the bank, the main front room, a middle room and a backroom downstairs as well as a couple of rooms upstairs. It was about 1:30 or two o'clock when I heard the man ask for the traveler's check. I did not push the buzzer to let him in; I don't know who did. It was a nice sunny day, and I don't know if the lights were on or not. There was plenty of light.

I was facing the windows and there was some sunlight [fol. 9] coming in from the windows. The teller area has a counter with four windows; it is about four or five feet high. The counter itself is about four feet high with partitions between the windows about five feet high. The partitions are fairly solid.

I am five feet eight inches tall. When the man first came in, I was seated with my back to the customer area. There were no other customers in the customer area.

The other man was in the corner and I didn't hear him say anything. He was to my right in the corner. The first man was to the man in the corner's right, about two windows over. Both were equally distant from the door. They were six to ten feet away from each other. When the second man was near the window, my view of him was blocked.

I didn't look at him because I was looking at the gun right in front of me. Florence Babick, another teller was working at the teller window next to me. She is able to push the buzzer to let people in. The man with the gun was about twenty feet from the door.

There is a fairly clear view of the door from the place where the button is pushed to open the door. I was never asked by the Police or by the FBI to view a lineup of possible suspects. I saw the six snapshots once. I made one statement to a man from the F.B.I., whose name I don't know. That statement was made half an hour or maybe 45 minutes after the incident happened.

We were all talking about what happened just after the incident. Most of the people had not seen what had happened because they had been upstairs or in the back. I probably told some of the other employees what I had [fol. 10] seen. I told nobody about the southern accent except the girl I talked to at the moment they came into the bank. I have known during my life fifteen or twenty people from Tennessee.

"Q. After hearing a man say the words that you said that were said in the bank, that a man has a Tennessee accent, are you able to determine that?"

"Mr. Dunne: Objection, your Honor. He said he had a southern accent. There are lots of states down south besides their home state."

"Miss Coonrod: Your Honor, I object to the statements of the United States Attorney."

"Mr. Smith: Your Honor—"

"Mr. Ginsberg: I object, your Honor."

"The Court: Now, just a moment here. Let's do this one at a time." "Mr. Smith"

"Mr. Smith: Your Honor, in his statement—"

"The Court: Never mind what is in his statement."

"Mr. Smith: Well, I would like to ask the question—"

. . . . . .

"The Court: You may proceed."

. . . . . .

"Miss Coonrod: Your Honor, will you rule on my objection."

"The Court: What was your objection?"

"Miss Coonrod: My objection is to the United States Attorney's continuous reference to these defendants when it is unnecessary. For example, when he said, Judge, now, the remark about Tennessee being their home state. I feel this is unnecessary and ask it be stricken."

[fol. 11] "The Court: Well, any reference to the—Tennessee being the home state of the defendants will be stricken."

"Mr. Dunne: Judge, I would object in light of the testimony of Mrs. Mary Ruth Rey that they resided in Pulaski, Tennessee."

(Whereupon Mr. Smith asked the witness the difference between a Georgia accent and a Tennessee accent.)

"By the Witness:"

"A. Well, I don't really know if I could give you any specific terms to make the difference, but I spent two and a half years in Georgia, Alabama, Carolina. I thought I could distinguish the little bit of difference that there is."

"By Mr. Smith:"

"Q. All right. Could you tell us how a man from Tennessee says, 'I want a money order'?"

"Mr. Dunne: Objection, your Honor. I will object further unless he lets him relate the whole conversation about, 'I will kill her, I will shoot her dead if she moves.'"

"Miss Coonrod: Your Honor, I—"

"Mr. Finsberg: Objection."

"The Court: Now, just a moment. I will sustain the objection to the last remark made by counsel for the prosecution. The witness may answer the question."

The people of Tennessee speak faster than others. It is a different kind of talk all together.

* * * * * * *

(Mr. Ginsburg filed his amended motion for the return of seized property and for the suppression of evidence.)

[fol. 12] PHILIP EDWARD MAZAIKA resumed the witness stand and testified further as follows:

Cross examination.

By Mr. Smith:

I am twenty two years old. I was twenty-one at the time of the robbery.

I viewed five or six snapshots of men. A couple of the pictures were with one man, and some were with other men, but I am not sure.

There were two pictures of the man I identified as being the man with the gun. They were both snapshots. There might have been just one: I cannot remember.

(Whereupon Mr. Smith requested that he be furnished with the pictures that the F.B.I. had shown to this witness. The government had no objection.

(The Court was advised that the pictures would be sent for.)

Cross examination proceeded.

I did not really see the man in the corner until they started to leave the bank. I did give a statement to the F.B.I.

I did not tell the FBI in the statement that I saw both of the men at that time. I did say in my statement that I saw two men at that time, but I didn't see them.

I further told the FBI that the other man got the money from Bea. I did not see that either.

I saw the man running with something in his hand and I assumed it was money. Later that day I saw a 1964 Thunderbird.

[fol. 13] The main difference between a 1959 and a 1960 Thunderbird is in the tail lights, I think. Off hand I cannot tell the difference between a 1960 and a 1961 Thunderbird, but the one I saw was a 1960. I cannot right off hand tell you the difference between a 1960 and a 1962, but I would be able to tell which was the newer model if I saw both together. But the one I saw on the 27th was definitely dirty.

I was maybe a half block away when I saw the car on 27th of February, or maybe it was about 100, 125 feet. I estimated the distance when I made the statement to the FBI.

(Objections by the United States Attorney and ruling.)

The bank is at 4812 Pulaski and the next block is 4900. It seems like an hour, but I guess it was about five or ten minutes from the time I saw the man with the gun in the bank until the time the two men left. I was standing next to Florence Babick, right in front of the man with the gun, during this entire time.

I was not able to see the second man until I moved as they started to leave. I saw the car for approximately five or ten seconds. It was exceptionally dirty all over.

(Mr. Smith again requested the pictures and the request was denied by the judge.)

Cross examination.

* * * * * * *

By Mr. Ginsberg:

There were three other tellers up front with me at the time of the incident, and there were others at the rear of the bank. The three tellers were Bea Parliaman, Florence Babich and Mary Bialek.

* * * * * * *

[fol. 14] I quit working at the bank about a month after the incident.

* * * * * * *

JOSEPH FRANZ, testified on behalf of the government as follows:

Direct examination.

By Mr. Dunne:

I live at 5129 South Halsted, and I am a circulation manager for the American.

My office is also located at 5129 South Halsted. I have been working in newspaper circulation for about seven years.

I knew a woman named Mary Ruth Rey during February, 1964. She owned a 1960 Thunderbird. I rode in the car during February, 1964.

* * * * * * *

The car was damaged from an accident on the right door and the right rear fender.

(Whereupon the witness identified government's exhibits 1-A and 1-B as pictures of the car.)

The scratch was on the car in February, 1964. On February 27, 1964, I got to the office about a little after twelve.

When I arrived at the office I saw Helen Scapardine.

I had a conversation with Helen Scapardine when I entered the office. Before I entered the office I noticed that

Mary Ruth Rey's car, the one previously described, was not in the street. After the conversation with Helen Sca- [fol. 15] pardine, I went to lunch and returned a little after one. At about two or 2:30 p.m., two police officers came in and asked me who owned the Thunderbird that was parked across the street. Shortly before that Mary Ruth Rey's brother returned the keys to the car. I had a short conversation with the police.

(Whereupon the witness identified William Earl Andrews as the brother of Mary Ruth Rey.)

I called Ruth Rey and had a conversation. I then placed another call, this time to Pat Jones. Pat Jones is Ruth Rey's sister and lives with her mother, Mary Mahon, at 848 West 51st. Place. I had a conversation with Pat Jones and then I took a ride and picked up Tommy Simmons from Ruth's mother's house at 848 West 51st. Place. I cut through the alley to get to the house.

(Whereupon the witness identified Thomas Earl Simmons in open Court.) We went for a cup of coffee at Sam's Drive-In on 51st. and we had a conversation.

I asked Tom Simmons if he knew why the police were checking on Ruth's car. He said he didn't know. I went to get some coffee, and Tom went across the street to a tavern, presumably to make a phone call. He came back after making the call and said he wanted me to stop back at Ruth's mother's house to pick up his bag and coat.

I told him that I had to pick up my son from school first, which we did, and then I dropped my son off at the office. I dropped Tommy off at Halsted and 55th. I went to Mrs. Mahon's home and Ruth's mother was there. Pat Jones was also there.

She showed me where Tommy's bag and coat were. After [fol. 16] picking up the bag and coat I went back to Halsted and 55th. and picked up Tom. He told me that he was going to leave town and asked me to tell Pat to keep her mouth shut. After that I went back to my office.

Cross examination.

By Mr. Smith:

Later on the afternoon of February 27, 1964, I was interrogated by the Federal Bureau of Investigation. They asked me for my whereabouts during the period of 1:30 and two o'clock on that date. I was questioned for about six hours.

I was taken to the station but never charged. I have driven the white Thunderbird, but I cannot remember exactly when. I own a white Rambler. I was interrogated by the F.B.I. from three to nine.

. . . . . .

I told Simmons that the police had been investigating about the car.

. . . . . .

Cross examination.

By Mr. Ginsberg:

I do not know Robert Garrett.

Cross examination.

By Miss Coonrod:

. . . . . .

I have known Simmons about a year.

Arlette Lucille De Luc, called as a witness on behalf of the government testified as follows:

I live at 3832 West 77th Street, Chicago, Illinois. As vice-president of Ben Franklin Savings and Loan Association I keep under my care custody and control the Federal Sav-[fol. 17] ings and Loan Association Insurance Certificate. That certificate is in full force and effect.

(Whereupon the witness identified government exhibit 2 for identification as that certificate.)

FLORENCE BABICK, called as a witness on behalf of the government testified as follows:

Direct examination.

By Mr. Dunne:

I live at 5616 South Karlov Street, Chicago, Illinois. In February, 1964, I was employed as a teller at Ben Franklin Savings and Loan, 4812 South Pulaski.

I was working at the bank on February 27, 1964, when around 2 p.m. two men came into the bank and went to one of the teller windows. When I went to the window to wait on one of the men, he put a gun through the window.

He said "Stay right there or I will shoot you."

(Whereupon the witness identified the defendant Thomas Earl Simmons in open court.)

He told the others in the bank not to set off the alarm. I am unable to identify the other man.

The man, who told me to stand tight where I was, had a definite southern accent or drawl. Everything that I have testified to took place in the City of Chicago, Northern District of Illinois.

Cross examination.

By Mr. Smith:

I came up on the elevator with three other ladies and Mr. Dunne to the 21st. floor. Mr. Dunne did not tell me at that time "There is one of the guys."

I did not see the man that I just identified in the hallway after leaving the elevator. The only man I saw in the bank [fol. 18] was the man who had the gun. I told the FBI in a

statement that I asked the taller of the two men who came into the bank if I could help him.

• • • • • • •

I could not see the second man because of the flowers and the raised partition. I did not see Mr. Mazaika but I knew he was behind me.

Although I cannot describe the second man, there were two men who came into the bank. I knew that the second man was there, but I could not see his face.

• • • • • • •

I was shown lots of pictures after February 27, 1964. There were both snapshots and other kinds.

There were at least two or three pictures of the man I have identified as Simmons.

"Q. No, what I am asking you is this: Except for Simmons, the one, the pictures of the man that you identified as Simmons, did any of these other individuals depicted in the pictures have more than one picture of them?"

"A. Well, there could have been."

"Q. You do not know?"

"A. Offhand, I don't, no, but I am sure that there could have been.

"Q. Were there some individual pictures only one picture of other individual?"

"A. Yes, there were."

"Mr. Smith: Your Honor, just for the record, I request those pictures again. I know that your Honor has overruled, yes.

[fol. 19] "The Court: Yes, you may request them again."

"Mr. Smith: Pursuant to 3500."

"The Court: That is right."

"Miss Coonrod: If your Honor please, I would like to join in Mr. Smith's request, the request made by Mr. Smith both as to these pictures and as to the prior pictures."

"The Court: I will assume that you are all joining in on these requests. Motion denied."

I never viewed a lineup of men on this case. I was present at two other robberies of Ben Franklin Savings and Loan. When I came here this morning I sat in the back of the courtroom. I saw Simmons in the courtroom at that time.

Three other ladies were with me at that time.

In the moments after the robbery was over, I may have discussed what happened with other employees of the bank. I may have talked it over with Mr. Mazaika and another girl at the window.

* * * * * * *

I cannot recall anyone other than Mr. Mazaika and the two tellers that I talked to concerning the robbery. On the day of the robbery I stayed at the bank until about five, an hour later than usual. I did not see anyone else being shown the pictures.

The men were in the bank about five minutes.

When the men left the bank they ran north. The three snapshots I saw of Simmons were at different angles, but I cannot remember if any of them were larger than snapshots. I read the statement I gave to the FBI this [fol. 20] I also read it when Mr. Dunne gave me the summons to appear here at the trial.

Between the time of the robbery and the time I saw him here this morning I did not see Simmons at all.

Cross examination.

By Miss Coonrod:

I don't remember seeing the men leave the bank building.

I saw the men run past the front window of the bank. I did not see Mr. Mazaika go out of the bank after them, although I could have from where I was.

I saw him re-enter the bank, but I don't remember how much later that was.

* * * * * * *

(Whereupon the government offered into evidence the two pictures of the 1960 white Thunderbird, and they were received.)

• • • • • • • •

MARY BIALEK, called as a witness for the government testified as follows:

Direct examination.

By Mr. Dunne:

I live at 4622 South Mozart and have been a teller at Ben Franklin Savings and Loan, 4812 South Pulaski, for two and a half years.

At about 2 p.m. on February, 1964 (sic) two men buzzed at the door of the bank and I let them in. They asked for a money order and another teller, Bea Parliaman went to one window and I went to another window.

One of the men went to the third window where he pointed a gun at Florence Babick and told all of us not to move or push the buzzer or he would shoot her.

[fol. 21] (Whereupon the witness identified Thomas Earl Simmons as the man with the gun.) One of the auditors who were in the bank at that time moved up in front and he told the man not to move or he would shoot Florence.

Another examiner got up in the middle of the room and the man motioned the gun away from Florence. I then hit the buzzer alarm on the floor. Soon after that the man with the gun saw that the other one had already gotten the money and they both went out. The man collecting the money was short and dark.

(Whereupon the witness identified Robert James Garret in open court.)

As they were walking toward the door I noticed that they had covered the money with a blue cloth.

Where upon a discussion was had out of the presence and hearing of the jury.

• • • • • • •

(A hearing was had out of the presence of the jury on the motion to suppress evidence on behalf of Robert James Garrett and the following testimony was taken.)

ROBERT JAMES GARRETT, called in his own behalf testified as follows:

Direct examination.

By Mr. Ginsberg:

A suitcase belonging to me was removed from the home of Mrs. Mary Mahon on the evening of February 27, 1964.

I can't be sure if government's group exhibit 4 for identification is the same suitcase because I only had it a week, but I could tell by the clothes inside.

(Whereupon the witness identified the clothes inside gov-
[fol. 22] ernment group exhibit 4 for identification as his.)

Government's group exhibit 3 for identification is not my suitcase.

Cross examination.

By Mr. Dunne:

I am a defendant in this case.

* * * * * * *

On the morning of February 27, 1964, I took the suitcase to the home of Mrs. Andrews at around 51st and Halsted.

* * * * * * *

Redirect.

By Mr. Ginsberg:

I did not consent to the removal of my suitcase from the basement.

* * * * * * *

MARY ELLEN MAHON, called as a witness, testified as follows:

Direct examination.

By Mr. Ginsberg:

I am 55 years old and I was formerly married to Frank Andrews. I now live at 848 West 51st Place.

I returned to my home from work at about 3:30 p.m. After I arrived home six men, whom I do not know, searched my home.

They did not tell me who they were and they did not show me any warrant. They searched both upstairs and downstairs in the basement.

They left when I asked them to, but two more guys came back at about 6:30 p.m. These two showed me a card at the door, but I couldn't tell what it was.

Three of the original six who searched the house had [fol. 23] guns in their hands.

The two men who came later did not have a warrant.

They were in the basement about three minutes and opened up the suitcases.

I asked them please not to take the suitcase but they took it with them. They also tore up the house and looked and searched everything.

Cross examination.

By Mr. Dunne:

I never saw anybody bring either of the suitcases to my home. I don't know how they got there, and I didn't give anybody permission to put them in the house.

I never saw any of the defendants, including my son and my son-in-law in my home on February 27, 1964.

* * * * * * * *

I went with the two people when they went to the basement and took the suitcases. I can't be sure if those are the same suitcases.

"—if they were FBI agents—contacted you at about 6:30 at night, didn't you consent to a search of your home?"

"A. Well, I didn't know what to do. I never had my home searched before."

"Q. Well, did they ask you if they could search your home?"

"A. They just said that they—they just said that there was something in the basement that they wanted, but I didn't know that the suitcase was down there; and so they went down, and I followed."

I wouldn't recognize the two men if I saw them again. I didn't give anybody permission to put either of the suit-[fol. 24] cases in my home on February 27, 1964. I did not see Andrews in my home that day.

* * * * * * *

DANIEL R. HUNTINGTON, called as a witness, testified as follows:

Direct examination.

By Mr. Finsberg:

I am a special agent of the F.B.I. On February 27, 1964, at about 5:15 p.m., I went to the home of Mrs. Mahon along with the agent Quinlan. We took government's exhibit No. 4, for identification from her house after opening it while inside the house. I do not recall Mrs. Mahon telling us not to take it. We did not have a search warrant.

* * * * * * *

Cross examination.

By Mr. Dunn:

I participated in the investigation of the Ben Franklin Savings and Loan, 4812 South Pulaski. I located a white Thunderbird and was told that it had been lent to Earl Andrews, whose mother lived a half block from where it was parked.

We went to Mrs. Mahon's home and knocked on the door. She let us in and we sat down with her, her husband, and his father and told them of the robbery and the possibility that Earl Andrews might have been involved in it. Mrs. Mahon told us she did not have a picture of him.

Mrs. Mahon consented to the search and we advised her of her rights when we first arrived.

She took us to the basement and at that time we opened and examined government's exhibits 3 and 4 for identification. She said that she didn't know whose suitcases they [fol. 25] were, but that she didn't mind if we opened them up. We examined the contents and told her that the money wrappers and coin cards inside indicated the suitcase came from whoever committed the crime. She said she guessed that that was right and she said we could take them, that they didn't belong to her. We took them from the home.

Redirect examination.

By Mr. Ginsberg:

It was only about a minute between the time the automobile was found that we went to the house.

We had no idea there was a suitcase there at the time.

"Mr. Ginsberg: The six men who Mrs. Mahon testified to first, are any of those men here?"

"Mr. Dunne: I don't know of any six men, Mr. Ginsberg. There may have been police there, but they took nothing, according to her testimony."

"Let the record show again that Mr. Ginsberg is conferring with Mr. Smith."

"The Court: Counsel, there is no purpose in—certainly co-counsel—I mean, they are not co-counsel, they represent different defendants, but they are certainly entitled to confer with each other. The record does not have to show that, as long as they do it inaudibly.

I would suggest that you do yours inaudibly, too, over here."

"Mr. Dunne: Yes, sir. But there is no other counsel at my table."

"The Court: The acoustics in this courtroom are almost too good."

[fol. 26] Arguments on motion to suppress evidence.

"The Court: In my opinion, the petitioner has not produced sufficient evidence to justify my holding that this search or seizure of this property was in any way illegal, and the motion is denied.

(Whereupon the following proceedings were had herein, in open court, in the presence and the hearing of the jury.)

* * * * * * *

Mary Bialek, called as a witness for the government testified as follows:

Direct examination resumed.

By Mr. Dunne:

When the man I identified as Garrett left the bank, he was carrying a blue cloth.

"Mr. Smith: I object to any reference to this blue cloth."

"The Court: The objection is overruled."

(Whereupon the witness identified government's exhibit 4F for identification as the same blue cloth.)

Cross examination.

By Mr. Smith:

Today I read over the statement which I gave to the FBI the day of the robbery. Mr. Dunne was present. Miss Dziedzic, an auditor at Ben Franklin, was also there.

The defendants whom I named on the witness stand were present in the courtroom when I arrived in the courtroom this morning with three other ladies.

I viewed snapshots and full-length pictures a few times after the robbery.

[fol. 27] I am not sure if there were three pictures of one man. I identified Simmons from some pictures I saw yesterday.

There was more than one picture of him. I discussed the case with the FBI several times, and they took down statements the day of the robbery and the day I identified the pictures.

I discussed the hold up with several other workers at the bank, including Miss Babick but not Mr. Mazaika. The first time I saw the snapshots, there must have been fifty or more.

I am not sure if anyone other than Simmons was depicted in more than one picture. The men were in the bank for about five minutes.

They had a line-up in the other robbery investigations but not in this one. They came several more times with the pictures to make sure we identified the right man. They brought pictures of Simmons each time, but I don't remember if they were the same ones I saw the first time.

• • • • • • • •

There were pictures of Garrett.

Mr. Mazaika went out of the association almost immediately after the holdup men.

He had to go through a door to the teller's cage to go after them.

I buzzed them into the bank. When they were outside the door I did not see anything suspicious about them.

I didn't see any weapons or the blue cloth. I haven't seen the man I have identified as Simmons since February 27, 1964. I haven't seen the picture at all since last year. [fol. 28] I don't know how they were dressed.

(Whereupon Mr. Smith requested the pictures used by the FBI to show this witness and the court ruled against the production of said pictures.)

Cross examination.

By Mr. Ginsberg:

When I talked to the FBI, I told them I did not get a good look at the Number 2 man.

The number 2 man said he wanted a money order when he came in, but I don't think he spoke in a manner that was unusual to me.

• • • • • • •

I did not see them full face as they were leaving.

Cross examination.

By Miss Coonrod:

I never saw any employee of the bank hand any money to the men.

And I never at any time saw any more than two men in the bank.

• • • • • • •

"Mr. Smith: I am going to ask that all witnesses who are in here, and who have testified, be excluded."

"Mr. Dunne: Your Honor, I am going to object to this. This is not the Star Chamber."

"Miss Coonrod: Your Honor, I object to any reference to Star Chamber in this record. This is a public trial. We are seeking justice."

"The Court: Just a moment. We will have no further comments. The use of the words "Star Chamber" is unnecessary, entirely. The witnesses who have testified, if they [fol. 29] are not going to testify further, may remain in the courtroom.

If they are going to testify further, they should be excluded. But they are certainly entitled to stay here if they are not going to testify further."

BERNICE PARLIAMAN, called as a witness by the government testified as follows:

Direct examination.

By Mr. Dunne:

I live at 3724 West 63rd Place, and I was teller at Ben Franklin Savings and Loan on February 27, 1964.

At about 2:00 p.m. two men came into the bank, and one of them asked if he could buy a money order. Then I saw that one of them had a gun leveled at me as he approached my teller window. He said, "Sack it, or stack it." He gave me a small blue sack, and I began filling it with cash from the drawer.

Whereupon the witness identified Simmons as the man who said "sack it, or stack it."

One of the other tellers hadn't seen the gun and asked the second man if the two were together. Then the first man moved toward the other teller, and the second one, I imagine, moved up and held a gun on me. The second man was shorter than the first.

(Whereupon the witness identified Garrett as the second man.) The second man told me to hurry up and I pushed the bag back over to him. About $1200 was in the drawer at the time. It was audited after the robbery.

I know that I had a group of $10.00 bills and a pack of five hundred. I had not opened that at all.

[fol. 30] I also had rolled coin and little folder with quarters and dimes in them.

(Whereupon the witness identified government's exhibit 4C for identification as money folders and coin wrappers similar to the ones she had in her drawer.)

* * * * * * *

"Q. I show you what has previously been marked as government's exhibit 4-F for identification, and I ask you if this is the same blue bag—the same, or similar to the, blue bag that was used to get the money?"

"A. It is similar, but it is not the one."

"Q. All right."

"Mr. Smith: I move that all testimony about this bag be stricken. She says, "Similar, but not the one."

"Miss Coonrod: I join in the motion."

"Mr. Dunne: It is a question of fact, Your Honor, for the jurors."

"The Court: Didn't somebody else testify with reference to this?"

"Mr. Dunne: Mrs. Bialek testified that that is the bag that she observed."

"The Court: No, the other witness."

"Mr. Dunne: The other witness, Mrs. Babick."

"The Court: (Continuing) No., the other witness did not qualify her statement, as I recall."

"Mr. Dunne: Mrs. Babick.

Mrs. Bialek, I think, did not qualify her statement."

"The Court: No. The objection is overruled. Motion denied."

[fol. 31] Cross examination.

By Mr. Smith:

I told the FBI that the gun looked like a water pistol. I also told them that that blue bag was not the same one.

He said "Stack it" very softly. He had the gun out the moment I came up to the window. Mrs. Babick was at her window when she asked the second man if they were together.

• • • • • • •

Mrs. Babick was not in a good position to see the first man. When she asked her question, the second man also had a gun in his hand.

I was shown photographs after the robbery. I identified one of the snapshots as being of Simmons, the snapshot that resembled him the most.

There were other pictures of him. I viewed the pictures again about a week later.

• • • • • • •

I saw the pictures again when I was subpoened to testify. They came out to my house and showed me pictures.

The day after the robbery they showed me at least three or four pictures of Simmons. There were more than one picture of other men, but I'm not sure if Garrett was one of these.

They showed me two or three pictures of Andrews at that time.

I was present at other robberies of the Ben Franklin Savings and Loan. In those investigations we were given a lineup to pick out the men.

• • • • • • •

[fol. 32] Cross examination.

By Mr. Ginsberg:

Both men spoke in the same way.

The whole occurrence took approximately three to seven minutes.

I don't remember if the second man's gun was bigger or smaller than the first. I described him to the FBI as smaller, darker, with a heavier beard—entirely different from the other.

• • • • • • •

Three or four weeks after the robbery two men showed me about twenty pictures.

One of them was of Garrett. I was also shown pictures of Garrett last week. There may have been other occasions as well.

The closest employee to the witness was Florence Babick and she was approximately twenty feet away when the bag was being filled.

• • • • • • •

Redirect examination.

By Mr. Dunne:

When rolled coins came into the bank I wrote the account number on the back of the cards or on the rolls.

(Whereupon the witness examined government's exhibit 4-b-1 and identified the handwriting thereon as her own.)

Recross examination.

By Mr. Ginsberg:

I started wearing glasses about five years ago. I'm not sure if I was wearing them on the day of the occurrence.

• • • • • • •

(Counsel for the defendant Simmons, joined by other defense counsel made a motion for mistrial based on the [fol. 33] fact that the witness, Parliaman, testified that the blue bag was not the bag used in the robbery and that she had told the government that it was not before giving testimony.)

(Whereupon the United States Attorney read to the court from a statement given by the witness describing the bag as smaller than a pillow case.)

The Court denied the motions.

BERNADINE DZIEDZIC, called as a witness for the government testified as follows:

Direct examination.

By Mr. Dunne:

I live at 3626 South Seely Avenue, and I am the comptroller at Ben Franklin Savings and Loan, 4812 South Pulaski road.

At about 2:00 p.m., February 27, 1964, I was in the back room of the bank at my desk. I heard a harsh male voice say, "Don't move. I will kill her. I will shoot her." Through a two-way mirror above my desk I observed a tall slender man holding a gun.

(Whereupon the witness identified defendant Simmons. It appeared that the identification was of Andrews and the witness after several questions went to the table and picked out Simmons.)

I turned to tell the head teller to push the alarm and then after I turned back to the window, I saw a man running north on Pulaske.

* * * * * * *

I saw him through the two-way mirror and the big window at the front of the bank.

[fol. 34] (Whereupon the witness identified defendant Garrett as the man she saw running outside the bank.)

Earlier in the afternoon the head teller had given Bea Parliaman $1050, consisting of a $500-band of $20 and a $500-band of $10 and a $50-band of singles. Immediately after the robbery I counted Miss Parliaman's cash box and found a discrepancy of $1581. In the ordinary course of business the bank takes in wrappers of coins for deposit in accounts or for exchange into currency.

I identify the numbers which appear on the papers in government's exhibit 4-B as savings account numbers in our Association.

I identify numbers on these papers as being the account numbers of certain depositors in our association.

Cross examination.

By Mr. Smith:

When I was first asked to identify the tall thin man, I did not point to the man you are standing next to.

Nothing was told to me prior to taking the stand about the significance of one of the men being in a brown suit. I am near-sighted.

(The witness admitted that there were several discrepancies in her descriptions. She denied telling the F.B.I. some of the information which appeared in her statement.)

• • • • • • •

I was shown pictures of men a day after the robbery and about three or four weeks later. There were about five or six pictures. Two or three of the pictures were of Simmons. I don't remember seeing any picture of Andrews.

[fol. 35] Mr. Dunne came to the bank and showed me pictures about a week and a half prior to trial. There were about four pictures. One or two were of Simmons and none were of Garrett.

During the week after the robbery I discussed the robbery with the other bank employees.

Cross examination.

By Mr. Ginsberg:

The robbery took about four or five minutes. I did not see Mr. Garrett in the bank. It is about twenty feet from where I sat to the street window of the bank. From my position Mr. Garrett appeared short and he did not have a crew cut.

"Mr. Dunne: The way it is now. I see."

"The Court: Counsel, I am going to caution you. I am talking now to the Assistant District Attorney, against making audible comments at the table. They should not be made. As I said yesterday, the acoustics in this courtroom are too good, sometimes. So, please refrain from making comments that can be heard from the jury or by anybody."

I saw one man leave the door, but saw two men passing in front of the window running from the bank. The man I saw leaving the bank was about six feet tall, slender with light hair.

I was shown pictures of Garrett about three or four weeks after the robbery. That is the only time I saw pictures of Garrett. I never saw him in a lineup. I heard one voice and described it as a harsh male voice.

* * * * * * *

(Whereupon proceedings were had out of the presence of the jury relative to the proposed introduction by the government of testimony of the defendant Garrett, made [fol. 36] at the hearing on the motion to suppress the evidence. The prosecutor argued that Mr. Garrett made admissions of ownership of a suitcase and clothing. Mr. Ginsberg, attorney for Garrett, objected. Mr. Smith and Miss Coonrod objected on behalf of the other defendants. The judge allowed the production of this evidence through the official court reporter.)

ROBERT J. BETZ, called as a witness on behalf of the government testified as follows:

My name is Robert J. Betz and I am Official Court Reporter to Judge Bernard M. Decker. I was present in court on February 17, 1965, and made a stenotype recording of the testimony of Robert J. Garrett. I prepared a transcript of the testimony and it is the same as government's exhibit 7 for identification. The following questions were asked and answers given.

"Q. Would you give the Court your name please."

"A. Robert J. Garrett."

"Q. To your knowledge, was a suitcase of yours removed from the home of Mrs. Mary Mahon on the evening of February 7, 1965?"

(Mr. Dunne corrected the date to February 27, 1964.)

"A. Yes."

"Q. And that suitcase belonged to you?"

"A. Yes, it did?"

"Q. Do you recognize the suitcase?"

"A. I recognize the suitcase."

"Q. Is this your suitcase?"

"A. I couldn't say I am positive, but the clothes in it—but by the clothes in it, I could be positive."

* * * * * * *

[fol. 37] "Q. Are these your clothes?"

"A. Yes."

"Q. The green suitcase is not yours is it?"

"A. No it is not."

"Q. Where did you take the suitcase on the morning of February 27, 1964, Mr. Garrett?"

"A. To Mrs. Andrews' house."

"Q. Where is that?"

"A. I don't know the address."

"Q. Could you give us a rough estimate or an indication, and inclination of where it is?"

"A. It is around 51st and Halsted, that is all I know."

"Q. When you took the suitcase to Mrs. Andrews' home, where if anywhere, in the home did you take the suitcase, Government's Group Exhibit 4 for identification?"

"A. To the basement."

"Q. All right. Were there any other suitcases taken to the basement at the same time?"

"A. ——."

* * * * * * *

"A. At the time that I took my suitcase down there?"

"Q. Yes."

"Q. Were any other suitcases taken down there?"

"A. Yes."

"Q. All right. Who took the suitcases down to the basement at the same time?"

"Q. Is the Government's Group Exhibit 3 one of the suitcases that was taken down to the basement at the same [fol. 38] time that this blue suitcase was?"

"A. I could not say."

"Q. You could not say?"

"A. No. It has been a year. I didn't even identify the one there because I didn't know positively whether that was mine or not."

"Q. You identified the contents of that suitcase; is that right?"

"A. Yes."

"Q. And the contents of that suitcase, the clothing, et cetera, was brought to you—was brought by you to Chicago in a suitcase similar to the one, Government's Group Exhibit No. 4 for identification, is that right?"

"A. Yes."

(Whereupon the Court instructed the jury that the testimony of Mr. Betz could not be considered against William Earl Andrews and Thomas Earl Simmons.

JOHN P. QUINLAN called on behalf of the government testified as follows:

My name is John P. Quinlan and I am a special agent of the Federal Bureau of Investigation. I have been so employed for fourteen years.

On February 22, 1964, I was investigating the robbery of Ben Franklin Savings and Loan at 4812 South Pulaski Avenue. I went to the vicinity of 51st and Halsted.

About five o'clock in the afternoon Agent Huntington and I went to 848 West 51st Place, Chicago, Illinois. That address is a one family dwelling house.

I spoke to Mrs. Mary Mahon. She is the mother of Wil- [fol. 39] liam and Earl Andrews and the mother-in-law of Thomas Simmons.

(Whereupon the witness identified William Andrews and Thomas Simmons in open Court.)

I identified myself to Mrs. Mahon and had a conversation with her in the home.

Present at the conversation were Mrs. Mahon's husband, his father and agent Huntington. I looked around the house.

William Andrews and Thomas Simmons were not in the house. Mrs. Mahon took me through the entire house.

In the basement I observed two suitcases. I opened the suitcases and examined the contents.

The suitcases were taken from the residence to the FBI office in Chicago. They have been in my custody until the trial. The only changes were that the paper wrappers were examined by the FBI laboratory for fingerprints. This process causes a slight discoloration.

Government's Group Exhibit No. 4 for identification is one of the two suitcases. I inventoried the contents of the suitcase.

I examined the contents and clothing in the suitcase. It is the same as it was when I examined it at the home of Mrs. Mary Mahon.

(Whereupon the witness identified government's exhibit No. 4-A a knotted lady's silk stocking found in the suitcase.)

(Whereupon the witness identified government exhibits 4-B3, 4-B2, 4-B7, and 4-C all exhibits being the various coin wrappers and money folders bearing notations and previously identified.)

[fol. 40] (Whereupon the witness identified a black leather holster taken from the suitcase.)

Such a holster is usually used to carry a short barreled snub-nosed two-inch barrel, 38 calibre revolver.

(Whereupon the witness identified a cigarette carton stamped with the words "Pulaski, Tennessee", part of government's group exhibit No. 4 for identification.)

(Whereupon the witness identified government's exhibit 4-F a piece of blue cloth found in the suitcase.)

Objection to the admission of the blue cloth was renewed by Mr. Smith and overruled.

(Whereupon the witness identified government's group exhibit No. 3 for identification as a suitcase also taken at the same time from the home of Mary Mahon.)

(Whereupon out of the presence and hearing of the jury counsel objected to the connection of the second suitcase and the objection was sustained. The testimony was stricken and the Jury was instructed to disregard it.)

On February 28, 1964, I again visited the home of Mrs. Mary Mahon.

At that time and place I had a conversation with Pat Jones, Mrs. Mahon's daughter. Together we returned to the basement and located a gray car coat.

"Mr. Dunne: Q. Was that gray car coat identified by Pat Jones as belonging to the defendant Andrews?"

"A. Yes."

"Mr. Smith: I object."

"Miss Coonrod: Your Honor, I object to that."

"The Court: Just a moment. Just make an objection [fol. 41] and I will rule on it. I will sustain it."

"Mr. Smith: I also move for a mistrial at this time."

"The Court: That motion is denied."

"Miss Coonrod: I will ask the jury be instructed to disregard it."

"The Court: I will instruct the jury to disregard the question asked by counsel."

(Whereupon Miss Jones was brought into the courtroom and identified by the witness as the person he had spoken to on February 28, 1964, at 848 West 51st Place.)

* * * * * * *

I examined the contents of the coat.

(Whereupon the witness was withdrawn so that another witness could be called.)

PATRICIA SCHUSTER, called as a witness for the government testified as follows:

Direct examination.

By Mr. Dunne:

I live at 3029 East 79th Street. My name was previously Patricia Jones. William Earl Andrews is my brother.

Thomas Simmons is my brother-in-law. I saw agent Quinlan on February 28, 1964. We had a conversation.

We went to the basement. He took quite a few things. I think he took a coat.

"Q. Did you identify this coat as belonging to the defendant Andrews?"

"Miss Coonrod: I object."

"Mr. Smith: I join the objection."

"The Court: You may ask her if she knows who the coat [fol. 42] belonged to."

"Mr. Dunne: May I refresh her recollection, your Honor."

"The Witness: I don't know who the coat belonged to because I hadn't seen my brother for quite a while and I couldn't say—"

"Mr. Smith: Your Honor—"

"Miss Coonrod, I object."

"Mr. Smith: With regard to this, I move for a mistrial at this time."

"The Court: That motion is denied. Counsel is entitled to examine."

I think that the gray coat belongs to my brother, William.

(Whereupon Mr. Smith moved that the testimony relating to the gray car coat be stricken.)

(Whereupon the following proceedings were had out of the presence and hearing of the jury.)

JOHN P. QUINLAN, out of the presence of the jury, resumed the witness stand and testified as follows:

(Whereupon the United States Attorney made an offer of proof regarding admission of the gray car coat. Objections and arguments were had and the Court sustained the objections. The jury was instructed to disregard testimony relating to the car coat.)

Cross examination.

By Mr. Smith:

On February 28, Pat Jones gave us some snapshots. They were of Andrews and Simmons.

No fingerprints were identifiable on the tested documents.

[fol. 43] Cross examination.

By Mr. Ginsberg:

I did not have a search warrant.

* * * * * * *

FRANKLIN L. JOHNSON, called on behalf of the government testified as follows:

Direct examination.

By Mr. Dunne:

I am an FBI agent. I was on duty in March of 1964, in Memphis, Tennessee.

On March 26, 1964, I was assigned to try to locate William Earl Andrews at the home of his sister 553 North Home Street, Memphis, Tennessee. We stopped the driver of a 1956 Chrysler.

We asked the driver if he was Andrews.

(Whereupon the witness identified William Earl Andrews in open court.)

He said he was Floyd Andrews. Floyd Andrews is William Earl Andrews' brother.

Later the driver of the car said that he was William Earl Andrews.

(Whereupon, said exhibits marked Government's Exhibits 1-A, 1-B, 2, 4, 4-A, 4-B, 4-C, 4-E, 4-F, were admitted into evidence against Robert James Garrett. Exhibits 1-A and 1-B were admitted as to all defendants.)

[Government Rests.]

(Whereupon the following proceedings were had in open Court, outside the presence and hearing of the jury.)

(Whereupon motion for judgment of acquittal was made [fol. 44] by all defendants.

Motions argued and denied.

(Therefore the following proceedings were had in the presence and hearing of the jury.)

Evidence Presented on Behalf of the Defendant Thomas Earl Simmons.

THOMAS EARL SIMMONS called in his own behalf testified as follows:

Direct examination.

By Mr. Smith:

I live at 5107 South Halsted with my wife and four children. I am 26 years old and have never been convicted of a felony.

I have been a farmer and factory helper, I was a farmer in Lincoln County, Pulaski, Tennessee.

I was in Chicago on February 27, 1964. Robert Garrett, William Andrews and myself left Pulaski, Tennessee to go to New York City.

Mr. Garrett and I were in the business of raising mink. Mr. Garrett borrowed $16,800. from New York for the mink farm.

We had car trouble in Philadelphia, Pennsylvania. In Chicago we had a four-ton cooler freezer unit and a trailer load of nest boxes for the mink ranch.

The cooler was in Cedar Lake, Indiana. My wife was taking care of the mink while we were away.

We were on the trip three days when we headed for Chicago.

We arrived in Chicago about 10:30 a.m. on February 27, [fol. 45] 1964, in Andrews' car, a 1950 Pontiac.

When we arrived at Mary Ellen Mahon's home, Pat, my sister-in-law let us in and we talked about an hour. Then Garrett, Andrews and I went to 51st and Halsted in Andrew's car.

The 5601 Club is located at that corner. We went in for beer. Andrews left several times. We left the bar about noon.

While we were in the tavern, Andrews went to get his sister's car. His Pontiac was in the parking lot, but he was having brake trouble. Andrews had his sister's 1960 Thunderbird. I did not get into the car.

Andrews and Garrett were supposed to go to Indiana, Andrews got in the car.

I did not see Garrett get in the car. I left Garrett and went to Sam's Drive-In on 51st and Racine where I ate.

I then walked to the Blue Dot tavern, 5202 South Ashland Avenue. I arrived there about ten after one and was there an hour or so.

I went back to my mother-in-law's house alone. Pat was there. At about 2:30 of a quarter to three I arrived.

I planned to take my suitcase and go to my brother's house. The next day I planned to leave Chicago.

* * * * * * *

I asked Pat if Andrews and Garrett had returned from Indiana. About fifteen minutes after I asked, they arrived.

Five minutes after they arrived, Joe Franz called on the telephone. Pat talked to him.

[fol. 46] She told me that Joe Franz wanted to see me in the alley. I met him in the alley. He said, "Get in." I didn't want to get in the car.

I asked Franz what this is about and he said, "The cops is after you for a robbery.", "I got to get you out of town." He said he was told that they were going to shoot me on sight. I went to Sam's Drive-In and called Andrews and Garrett.

Franz dropped me off and went for my suitcase.

Franz had a "guy" take me to Indiana. In Hammond, Indiana, I caught a bus to Pulaski, Tennessee. The next day I was arrested by a fellow named Jack from Columbia, Tennessee.

I was never in a line up—to my knowledge. I did not rob the Ben Franklin Savings and Loan Association.

* * * * * * *

Cross examination.

By Mr. Ginsgerg:

I am not related to Mrs. Garrett, but have known him five or six years, since he was in the service.

Cross examination.

By Mr. Dunne:

I had a suitcase and I think Garrett had a suitcase.

I don't know the color of the other suitcase or their clothes. My suitcase was upstairs. I have worked at the Premier carton Co. in Chicago.

I worked there for six years beginning June 1956. We own 20 acres in Tennessee and raise mink. The farm is in my name with my wife.

We paid $300 for a truck and $3,000. down on the farm. He had gotten a loan in New York.

[fol. 47] He gave me $5,500. in cash out of that loan. I have also worked part time as a bartender in my brother's tavern.

* * * * * * *

I never had a chance to pick up the equipment at Cedar Lake. I did not tell the arresting agent that I was at home on February 27, 1964.

I did not state that at 4:00 or 5:00 a.m. of February 28, 1964, Bonnie and Ruth Andrews left to get parts for a water pump.

* * * * * * *

CHRISTINE PATRICIA SCHUSTER, called on behalf of the defendant Simmons testified as follows:

Direct examination.

By Mr. Smith:

I was at home at about 3:00 p.m. on February 27, 1964.

My brother-in-law, Tommy Simmons, came home to get his things to go to his brothers. He was alone.

Andrews and Garrett came in fifteen minutes later. Then Joe Franz called, he wanted Tommy to meet him in the alley. Tommy left. The F.B.I. took pictures from me.

Cross examination.

By Mr. Dunne:

Tommy Simmons, Earl Andrews and Bob arrived at Mrs. Mahon's house about 10:00 a.m. on February 27, 1964.

I guess they had suitcases. I work nights and I was sleeping.

* * * * * * *

After Simmons left, he called back and ask to speak to Bob.

(Whereupon the witness identified Robert Garrett.)

[fol. 48] I did not tell the F.B.I. that my brother left without his coat.

Later that day I saw Joe Franz at the Lamex Restaurant.

• • • • • • •

Before February 27, 1964, I hadn't seen my brother for several months. I did call my sister once in a while.

I had never seen Bob before. As far as the mink business, I really don't know how long they had it.

Prior to going south, Mr. Simmons owned a tavern known as the Little Black Book. He owned it with his brother.

(Whereupon the defendant, Thomas Earl Simmons rested his case in chief.)

(The parties entered into a stipulation that the birth certificate of Robert James Garrett is true and accurate.)

(Whereupon defendant Garrett's Exhibit No. 1 was offered and admitted into evidence. Defendant Garrett rests.)

(Defendant William Earl Andrews rests.)

Rebuttal Testimony on Behalf of the Government.

JAMES L. MAHON, called on behalf of the government testified as follows:

Direct examination.

By Mr. Dunne:

I am an agent of the Federal Bureau of Investigation and have been for twenty years. I participated in the investigation of the Ben Franklin Savings and Loan during February, 1964. I interviewed Mrs. Patricia Jones during the course of that investigation.

She told me that Simmons called Andrews.

[fol. 49] She also told me that after the telephone call Andrews and Garrett left the house in a hurry.

• • • • • • •

JOHN S. STANTON, called as a witness on behalf of the government, testified as follows:

Direct examination.

By Mr. Dunne:

I am a special agent of the F.B.I. stationed in Columbus, Tennessee. I went to the home of Thomas Earl Simmons on February 28, 1964.

(Whereupon the witness identified Thomas Earl Simmons.)

I placed him under arrest at that time.

* * * * * * *

During the interview with Simmons he stated that he definitely was in Tennessee on February 27, 1964.

Whereupon the Government Rested Its Rebuttal Evidence.

(The following proceedings were had in open Court out of the presence of the jury.)

Motions for judgment of acquittal made and denied.
Conference on instructions.

(Whereupon closing arguments were had for all parties.)

(Whereupon the court instructed the jury)

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 64 CR 134

UNITED STATES OF AMERICA, Plaintiff,

vs.

WILLIAM EARL ANDREWS, THOMAS EARL SIMMONS, and ROBERT JAMES GARRETT, Defendants.

Transcript of Proceedings on the Motion to Suppress—February 16, 1965

* * * * * * *

[fol. 27] HELEN SCAPARDINE, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Dunne:

Q. Mrs. Scapardine, I will ask you the same question I asked Mrs. Rey, please keep your voice up so everybody can hear what you are testifying to. Will you do that, please.

A. Yes.

Q. Thank you. Give me your name, please, and spell your last name.

A. Helen Scapardine, S-c-a-p-a-r-d-i-n-e.

Q. Where do you live, Mrs. Scapardine?

A. 11816 South Peoria.

Q. What is your occupation?

A. Housewife.

Q. Now, directing your attention to Thursday, February 27, 1964, were you working?

A. Yes, I was.

Q. Where were you working?

A. At the Tower Lake News Agency.

Q. Now, do you know a woman named Mary Ruth Rey?

[fol. 28] A. Yes, I do.

Q. That is the same lady that testified here just before you?

A. Yes.

Q. Now, I direct your attention to Thursday, February 27, 1964. About what time did you get to work?

A. About 11:30, quarter to twelve.

Q. All right. Did you have occasion to receive a telephone call from Mrs. Rey?

A. Yes.

Q. After that phone call, did you have occasion to see anyone at the Tower Lake News Agency?

A. Yes, I did.

Q. Who was that?

A. William Earl Andrews.

Q. Do you see him in court today?

A. Yes.

Q. Will you point him out for the record and describe what he is wearing?

A. He is wearing a blue suit.

Q. Did you have a conversation with Andrews when he came into the News Agency?

A. Yes.

[fol. 29] Q. What did you say to him and what did he say to you?

A. He said—

Mr. Smith: Your Honor, there is a standing objection for any conversation outside of the presence of my client.

The Court: This is to be admitted as to the defendant Andrews.

Go ahead and give the conversation, what he said and what you said, in substance.

By the Witness:

A. He said that Mary Ruth Rey said that he could use the car keys.

The Court: Did you have the car keys?
The Witness: Yes.

By Mr. Dunne:

Q. Did you give him the car keys?
A. Yes, I gave them to him.
Q. Do you know of your own knowledge what kind of a car Mary Ruth Rey owned on that day, February 27, 1964?
A. Yes.
Q. What kind of a car?
A. 1960 white Thunderbird.
[fol. 30] Q. Please keep your voice up.
A. Yes.
Q. Now, was there anything unusual about the passenger door side of the automobile?
A. Yes.
Q. What was unusual about it?
A. There was a long scratch on the side of it.
Q. Now, I show you what has been previously marked Government's Exhibit 1-A for identification, and ask you to look at that picture and ask you if that is the automobile of Mary Ruth Rey?
A. Yes, it is.
Q. Did she own that on February 27, 1964?
A. Yes.
Q. And you were using it while she was in the hospital, is that right?
A. Yes.
Q. I show you a second picture, Government's Exhibit 1-B for identification and ask you if that is another picture of the same car?
A. Yes, it is.

Q. Now, later that same day, February 27, 1964, about two or 2:30 p.m., did you have occasion to again see Andrews?

[fol. 31] A. Yes, I did.

Q. Did he come into the store?

A. He came into the agency.

Q. Did you have a conversation with him?

A. Yes. He said, "Here's the car keys."

Q. Did he give you the car keys?

A. Yes.

Q. Did you see Andrews after that time?

A. No.

The Court: What time was that?

The Witness: About 2:30, quarter to three.

Mr. Dunne: No further questions.

The Court: Cross-examine.

Cross examination.

By Mr. Smith:

Q. You say you work in the Tower Lake News Agency?

A. Yes.

Q. Who is your employer there?

A. Joseph Franz.

Q. Does Joseph Franz ever have occasion to drive that car that you testified about?

A. Yes.

Q. Was he driving the car during this period?

[fol. 32] A. No.

* * * * * * * * *

[fol. 43] PHILLIP EDWARD MAZAIKA, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

* * * * * * * * *

[fol. 52] Cross examination.

By Mr. Smith:

. . . . . .

[fol. 53] Q. Now, were you in the courtroom this morning?

A. Yes, I was.

Q. And were you present with members of the Federal Bureau of Investigation?

A. Yes, I was.

Q. And were the defendants here at that time in the courtroom?

A. Yes, I think two of them.

Q. Was there anyone else besides the defendants and their wives seated in the back of the courtroom?

A. Sir, I don't know who you mean. There were just a few other people. I don't know if they had anything to do with this. But I couldn't tell you who they were or anything.

Q. Now, had you ever been down to the Federal Building before this morning?

A. No, I haven't.

Q. During the last eight months at any court proceed-

[fol. 54] ings, had you ever observed any of the defendants?

A. No, I haven't.

Q. When you returned to the bank on February 27th, 1964, how long did you stay at the bank?

A. Well, it must have been around six or 6:30 or possibly seven, I don't remember exactly.

Q. Six or 6:30, possibly seven.

A. I know it was after quitting time. I stayed around a little while.

Q. Were you interviewed by agents of the Federal Bureau of Investigation?

A. Yes, I was.

Q. Were you shown any pictures at that time?

A. I don't quite remember if I was shown pictures that day or not. I don't think I was.

Q. You don't think you saw any snapshots or anything?

A. I can't remember now whether it was that day or the day after when they were there.

Q. All right. Now, when you were shown pictures, where were you?

A. I was at the Ben Franklin Savings & Loan.

Q. And the Federal Bureau of Investigation came out?

[fol. 55] A. Yes, they did.

Q. Did all the members of the bank that were present on the 27th look at the pictures?

A. Yes, I believe they did.

Q. Were you together when you looked at the pictures?

A. No, we weren't.

Q. Where did you look at the pictures, in what room of the Federal Savings & Loan?

A. Well, we were right up front. There is a desk between—well, call it the lobby where people wait before they go to the teller. It was around in the afternoon. I think it was about noontime. We were the only three there.

Q. Were you the first person to look at the pictures at the bank, and the bank employees?

A. I don't think so.

Q. Others had looked before you, is that correct?

A. I think so. I was working and they told me to come down and look at some pictures.

Q. Now, will you describe the pictures. Were they snapshots, big photos, what type of pictures were they?

[fol. 56] A. They were snapshots, about four by six or whatever they are.

Q. How many pictures were shown to you at that time?

A. I think there were about five or six different pictures.

Q. Five or six pictures and all snapshots?

A. Yes. Excuse me, I am sorry. There was one picture that was larger, too. I remember now.

Q. Now, where have you lived most of your life?

A. Chicago, south side.

Q. Have you ever lived in any other part of the country?

A. Well, I spent two and a half years in Fort Benning, Georgia, in the Army.

Q. All right. How many people were in the bank at the time that you heard a man say, "I want a travelers' check"?

Mr. Dunne: Objection, your Honor. He identified the man as Simmons. That is what the posture of the evidence is.

The Court: Well, "heard someone," he may ask the [fol. 57] question in that fashion.

* * * * * * *

[fol. 63] Q. Now, at any time, were you ever asked by the City Police or the Federal Bureau of Investigation to view a lineup of possible suspects in this case?

A. No, I wasn't.

Q. How many times did you see those six pictures that you were given?

A. Just that one time.

Q. How many statements did you make to the Federal Bureau of Investigation?

A. I believe I just made that one to that man—I don't know what his name was.

Q. When did you make that statement?

I mean, in relation to the bank robbery, when did you make that statement?

A. Oh, it must have been a half hour or so, maybe 45 minutes after the incident happened.

* * * * * * *

[fol. 77] Q. Now, you mentioned that you were exhibited [fol. 78] certain pictures by the Federal Bureau of Investigation, six pictures; five snapshots and a larger picture?

A. Yes.

Q. Were any of these pictures—were any of the pictures there or more than one of the pictures of an individual man?

A. Yes, there were.

Q. How many pictures of one individual man were they out of the six?

A. Oh, I don't—I don't understand your first question. Maybe I answered wrong.

Q. Maybe I did not put it very well.

Were there six men depicted in these pictures, or were there five or four or three or two or one?

A. Well, a couple were with one man and some were with other men, three or four, I don't remember how many.

Q. So in two instances, there were two pictures of one man?

A. I don't remember. There might have been maybe just one, I don't—I am not sure.

[fol. 79] Q. Now, were there two pictures of the man you identified as being the man with the gun?

A. Yes. Yes, there were.

Q. Were there two pictures—were both of those snapshots?

A. Yes, those were snapshots, yes.

Q. Two snapshots of one man?

A. I believe that there were two; there might have been one, I cannot remember.

Q. Now, Mr. Mazaika—

Mr. Smith: Your Honor, I would request under 3500 that these—I would request these snapshots, they were part of the statement. I would like all six, I mean, I make the request for all six photographs from the Federal Bureau of Investigation or the Prosecutor's Office so that I can examine these and tell exactly what these pictures were.

Mr. Dunne: I object. Your Honor, I—well, I have no [fol. 80] objection, no particular objection, however, I don't think that they would qualify under 3500 statements as pictures.

The Court: Let me see the 3500 statement.

(The court examined the document.)

The Court: Well, I don't think that these qualify, either, under the 3500 statement.

Mr. Smith: Well, the only point is that this is the only man that—there was no lineup in this case; this is the only time that the man was shown any pictures, he is shown—

Mr. Dunne: The man saw them in open Court and identified them in open Court.

Mr. Smith: After he sees him in the Courtroom the same morning.

The Court: Well, gentlemen, you may argue this case later.

Well, the Prosecutor has made the statement that he has [fol. 81] no particular objection to it, and, although they may not technically qualify under 3500, I—

Mr. Dunne: Judge, I sent the special agent to get a special group of pictures; we may or may not be able to identify the pictures which we have, and there are a multitude of them, as to the precise pictures which were shown to Mr. Mazaika. But I am perfectly willing to have him have all of the pictures.

The Court: Proceed with the examination. We will determine this question later on.

Mr. Smith: All right.

The Court: We are not going to stop for this.

This is no part of the statement itself.

By Mr. Smith:

Q. Now, Mr. Mazaika, as I understand it, the other man, [fol. 82] not the man with the gun, because he was in a corner you did not really see him until they started to leave the bank, is that correct.

A. That is correct.

• • • • • • •

[fol. 92] The Court: Well, I am going to deny your request on the pictures because they are no part of this statement.

By Mr. Smith:

Q. As to the pictures, besides the pictures of the man that you say was the man with the gun, they showed you two of those, did you see any man, do you see any man in this courtroom now that was depicted in the pictures that they showed you?

A. Do you mean the pictures that they showed me is that man in the courtroom, is that what you mean?

Q. Besides the man with the gun, the one that you say was with the gun?

A. I could not tell from the pictures.

Q. Oh, you cannot tell anything from the pictures?

A. No.

Mr. Dunne: Objection, your Honor. He answered the question. There is no need for Mr. Smith to restate the answer.

[fol. 93] The Court: I will agree, the answers should not be restated.

* * * * * * *

[fol. 133] Florence Babick, called as a witness by the Government, having been first duly sworn, was examined and testified as follows:

* * * * * * *

[fol. 140] Cross examination.

By Mr. Smith:

* * * * * * *

[fol. 146] Q. Now, were you ever exhibited pictures of anyone after February 27, 1964?

A. Yes, sir.

Q. How many pictures were shown?

A. Oh, lots of them.

Q. Were they snapshot type pictures?

A. They were all kinds. They were snapshots and other kinds.

Q. Now, were there more than one picture shown of any individual man?

A. Yes, sir.

Q. Were there more pictures than one shown of the man you now identify as Simmons?

A. Yes, sir.

Q. How many pictures would you say approximately?

[fol. 147] A. Well, I would maybe say two or three other pictures.

Q. Two or three other pictures?

A. Yes.

Q. Two or three other pictures of Simmons?

A. I don't know.

Q. Now, were there more than one picture of any man that you didn't identify as being in the bank?

A. Well—

Q. Do you see what I mean? Do you understand the question?

A. If there were I am sure I would have recognized him if I saw more than one picture of—more than one picture of one man, but they would not be outstanding to me.

Q. No, what I am asking you is this: Except for Simmons, the one, the pictures of the man that you identified as Simmons, did any of these other individuals depicted in the pictures have more than one picture of them?

A. Well, there could have been.

Q. You do not know?

[fol. 148] A. Offhand, I don't, no, but I am sure that there could have been.

Q. Were there some individual pictures, only one picture of other individuals?

A. Yes, there were.

Mr. Smith: Your Honor, just for the record, I request those pictures again. I know that your Honor has overruled, yes.

The Court: Yes, you may request them again.

Mr. Smith: Pursuant to 3500.

The Court: That is right.

Miss Coonrod: If your Honor please, I would like to join in Mr. Smith's request, the request made by Mr. Smith both as to these pictures and as to the prior pictures.

The Court: I will assume that you are all joining in on these requests.

Motion denied.

* * * * * * * *

[fol. 154] By Mr. Smith:

Q. Did you say—

A. But I would say five minutes.

[fol. 155] Q. Okay. Thank you.

Did you see which way the two men ran when they exited from the bank?

A. They ran north.

Q. Would you say—

Mr. Smith: Strike that.

By Mr. Smith:

Q. Were these three or so pictures that you saw of Simmons the snapshots—the snapshots, were they at different angles?

A. Yes, different angles, yes.

Q. Were there any pictures of Simmons larger than a snapshot?

A. I don't remember. I really don't remember. It has been a long time ago.

Q. All right. Now, when is the last time you read your statement that you gave to the Federal Bureau of Investigation?

A. (No response.)

Q. (Continuing) I show you what has been marked Government's Exhibit C for identification.

(Document handed to the witness.)

By the Witness:

A. I saw this this morning.

• • • • • • •

[fol. 181] ROBERT JAMES GARRETT, one of the defendants herein, called as a witness in his own behalf upon a motion to suppress, having been first duly sworn, was examined and testified as follows:

• • • • • • •

[fol. 182] Cross examination.

By Mr. Dunne:

• • • • • • •

[fol. 202] Q. And the contents of that suitcase, the [fol. 203] clothing, et cetera, was brought to you—was brought by you to Chicago in a suitcase similar to the one, Government's Group Exhibit No. 4 for identification, is that right?

A. Yes.

Mr. Dunne: I have no further questions.
The Court: You may step down.
Mr. Ginsberg: Could I ask some rebuttal questions?
The Court: Yes.

Redirect examination.

By Mr. Ginsberg:

Q. Mr. Garrett, did you consent to the removal of the suitcase from the home of Mrs. Andrews?

Mr. Dunne: I can't understand the question, Mr. Reporter. Will you repeat the question.

(Question read by the reporter.)

Mr. Dunne: Objection. I can't understand how that is relevant.

The Court: Why?

Mr. Dunne: I can't see how that is relevant—oh, I [fol. 204] will withdraw the objection.

The Court: He may answer.

By Mr. Ginsberg:

Q. Did you consent to that?

A. No, I did not.

Q. How long ago—when did I become your attorney?

Mr. Dunne: I don't understand question again.

Mr. Ginsberg: I asked when did I become Mr. Garrett's attorney.

Mr. Dunne: Oh, I will stipulate that Mr. Ginsberg was appointed January 11, 1965.

The Court: The record shows this.

Mr. Ginsberg: I have no further questions of this witness.

The Court: That is all.

• • • • • • •

[fol. 206] Mary Ellen Mahon, called as a witness by the defendant Garrett on a motion to suppress, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ginsberg:

• • • • • • •

[fol. 209] Q. Did they ever tell you who they were?

A. No, they did not.

Q. Did they ever show you any kind of a warrant?

A. No, they did not.

Q. After their arrival, could you tell the Court what they did?

A. They searched my house.

Q. Did they go upstairs?

A. Yes.

Q. Did they go downstairs?
A. Yes.
Q. How long did they remain downstairs?
A. About ten minutes.
Q. And by "downstairs", you mean—

Mr. Ginsberg: I am referring to down in the basement when I say "downstairs".

By Mr. Ginsberg:

Q. Downstairs, is that what you mean?
A. Yes.
Q. How long did they remain in the basement?
A. About ten minutes.
Q. Then what did they do?
[fol. 210] A. They came back up and left, when I asked them to.

* * * * * * *

[fol. 212] Q. What did they do with the suitcase that I [fol. 213] showed you?
A. They took it with them.
Q. Did you say anything to them—
A. I asked them please not to take it, but they did.
Q. Did these two men do anything else while in your house?
A. Oh, they tore the house up and looked and searched everything.

Mr. Ginsberg: No further questions.
The Court: Cross examine.

Cross examination.

By Mr. Dunne:

Q. Mrs. Mahon, did they take two suitcases?
A. Yes.
Q. And is Government's Group Exhibit No. 4 the other suitcase, if you know?

A. They both was taken.

Q. Did you own those suitcases?

A. No, I didn't own them.

Q. Do you know who Government's Group Exhibit No. 3, this suitcase, belongs to (indicating)?

A. No.

[fol. 214] Q. No?

A. No.

Q. Did you ever see anybody bring that suitcase to your house?

A. (No response).

Q. Please answer yes or no.

A. No.

Q. He is taking it down on this little machine.

A. No.

Q. Did you ever see anybody bring Government's Group Exhibit No. 4 to your home?

A. That might be the suitcase. I would not say.

Q. Well, did you ever see anybody bring Government's Group Exhibit No. 4 to your home?

A. No.

Q. You never did?

A. No.

Q. All right. Then, do you know how these two suitcases got in your house?

A. No.

Q. Now, did you give anybody permission to put these two suitcases in your house?

A. No.

Q. Directing your attention to the counsel table here, [fol. 215] where defense counsel are seated, have you ever seen any of the men who are seated at that counsel table in your home on December 27, 1964?

A. No, I wouldn't know them again if I should see them.

* * * * * * *

[fol. 223] DANIEL R. HUNTINGTON, called as a witness by the defendant Garrett upon a motion to suppress, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ginsberg:

* * * * * * *

Q. Who was with you at that time?

[fol. 224] A. Special Agent John Quinlan.

Q. Anyone else?

A. No.

Q. At that time—

Mr. Ginsberg: Strike that.

By Mr. Ginsberg:

Q. Do you recognize this suitcase?

A. I do.

Mr. Dunne: Referring to Government's Group Exhibit No. 4 for identification.

Mr. Ginsberg: Yes. Thank you.

By Mr. Ginsberg:

Q. What did you do with this suitcase on February 27, 1964, if anything?

A. (No response).

Q. Did you take this from the house?

A. Yes, we did.

Q. Did you open it?

A. We opened it in the house.

Q. Do you recall being told by Mrs. Mahon not to take the suitcase with you?

A. No.

Q. Did you have a warrant?

A. No.

[fol. 225] Q. Do you know, of your knowledge, if any other visitors, other than—I think that you said Mr. John—

A. Mr. John Quinlin.

Q. Did any other FBI Agents, or men acting under your authority, visit the house that day?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No.

Q. To clarify that last question, do you know any other Agents, or men acting under your supervision, acting under your instructions, who were at the house before the time that you were there?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No.

Q. And to your knowledge, there was no warrant issued that day for the removal of this suitcase from the house?

A. No.

Mr. Ginsberg: Thank you. I have no further questions.

The Court: Cross examine.

[fol. 226] Cross examination.

By Mr. Dunne:

* * * * * * *

[fol. 227] Q. That would be Elmer Mahon?

A. Elmer Mahon. Mr. Mahon and his father, Mr. [fol. 228] Mahon's father. This was in the livingroom.

Q. All right. Did you have a conversation in the livingroom with Mrs. Mahon?

A. That is correct.

Q. What, if anything, did you say to her and what, if anything, did she say to you?

A. We explained our purpose for being there, that there had been a robbery committed at the Ben Franklin Savings & Loan Association, and we had reason to believe that Earl

Andrews may have been a participant, and we asked general questions relative to Andrews' size, weight, what he looked like, asked if she had a photograph of him.

Q. What did she say?

A. She said that she did not.

Q. All right. After that, did you have a further conversation with her?

A. Yes, sir. After having been in there for quite some time, we asked her if we could look around, because of the possibility—because the possibility existed that Earl Andrews may be in the house at that moment.

Q. What did she say when you asked her if you could look around?

[fol. 229] A. She said that she didn't mind at all; in fact, she would help us look around.

Q. All right. At that time, did Agent Quinlan have occasion to say anything to her with respect to her rights?

A. Oh, yes, absolutely. We told her, right at the beginning, that she didn't have to let us in, that we were merely there to ask questions and we were trying to gain information about her son and the whereabouts of her son. Anything that we found, or if we found him in the house, of course, we wanted to talk to him; we would have to cross that bridge, of course, if we found him in there.

Q. Did she have occasion to consent to the search of her home?

A. Yes, she led the search.

Q. All right. Did she take you to the basement apartment of her home?

A. Yes, she did.

Q. Did you have occasion to, at that time, in her presence, open and examine Government's Group Exhibits 3 and 4?

A. Yes, sir, we did.

Q. Subsequent to that time, what did you do, if any-

[fol. 230] thing?

A. Well, we asked her if those were her suitcases and she said no. We said whose are they? She said, "I don't know."

"Do you mind if we open them up?"

She said, "No, go right ahead."

Q. Did you open the suitcases up?

A. Yes, we did, in her presence, and in the presence of the other two gentlemen.

Q. All right. After you opened the suitcases up, did you examine the contents?

A. Yes, sir, we did.

Q. What did you do after that?

A. Well, we pointed out to her that we found—as she could see—that there were money wrappers, there were little coin cards that the coins are in—no, with the name of Ben Franklin Savings & Loan Association on them. We said that this looked like it probably came from whoever committed this crime.

Q. What did she say?

A. She said she guessed that it did. And so then—

Q. Then what happened?

[fol. 231] A. Then we asked her could we take them, and she said "Yes, you can. They don't belong to me."

Q. And did you take them from the home?

A. Yes, sir.

Mr. Dunne: No further questions.

Mr. Ginsberg: I have just two more questions, Your Honor.

The Court: Yes.

Redirect examination.

By Mr. Ginsberg:

Q. What time did you learn that you were looking for a man named Earl Andrews?

A. Well, contemporaneous with the time that we entered the house, 5:15; this was only a half a block, you see, from where the automobile was found. So this is just instantaneously.

Q. I see. In other words, this is just a few minutes between the time that you were looking for a certain individual and the time that you went to that house?

A. Maybe a minute.

Q. Maybe a minute?

A. Yes. We were moving pretty fast.

[fol. 232] Q. Did you know that there was a suitcase there?

A. No, we had no idea.

Mr. Ginsberg: May I have a minute?

The Court: Yes.

(Brief interruption)

By Mr. Ginsberg:

Q. When you arrived at Mrs. Mahon's house and entered the house, could you discern if anyone had been there before, or on any investigation?

Mr. Dunne: I object to that.

The Court: Sustained.

Mr. Ginsberg: Let me rephrase the question.

The Court: All right.

By Mr. Ginsberg:

Q. To your knowledge, had any governmental authorities visited the house before you arrived?

Mr. Dunne: Objection; asked and answered.

The Court: He has already asked that. He said that he had no knowledge of anybody else being there.

Mr. Ginsberg: No further questions.

The Court: That is all.

(Witness excused)

* * * * * * *

[fol. 247] Mary Bialek, recalled as a witness by the Government, having been previously duly sworn, resumed the stand and testified further as follows:

* * * * * * *

[fol. 248] Cross examination.

By Mr. Smith:

* * * * * * *

[fol. 251] Q. On that occasion, did they show you snapshots?

[fol. 252] A. Snapshots and pictures and other pictures.

Q. Full-length pictures?

A. Yes.

Q. The first time, did they show you snapshots?

A. The first time, do you mean?

Q. The first time that you saw them.

A. I believe so.

Q. You believe so.

A. Yes.

Q. Now, of those snapshots, were there more than one picture of a given man?

A. Yes.

Q. Were there, in fact, three pictures of one man?

A. Of one man—you mean, just three pictures?

Q. Three pictures of one man.

A. Three pictures of one man? Well, of that, I am not sure.

Q. Now, was the man, who they had more than one picture of, was that the man that you now identify as Simmons?

A. I identified Simmons from some pictures that I saw yesterday.

Q. More than one picture of Simmons?

[fol. 253] A. Yes.

Q. Now, after identifying the pictures the first time, did you discuss the case with the Federal Bureau of Investigation?

A. I discussed it several times with them.

Q. How many times would you say that you discussed it?

A. Approximately, I could not tell you.

Q. Well, was it more than three times?

A. This, I am sorry, I could not tell you.

Q. Well, you discussed it with them the day of the occurrence?

A. Yes, sir.

Q. You discussed it with them the next day?

A. I am sorry, I cannot tell you just what days.

Q. Well, you say that you discussed it with them when they showed you the snapshots?

A. Yes, sir.

Q. Did they take down what you said?

A. They took down, at the time of the holdup, yes.

Q. How about the time that they showed you the pictures?

A. That I identified the person?

[fol. 254] Q. Yes.

A. Yes.

Q. Did you discuss, at that time, what this man, that you are now identifying, had done at the time of the holdup?

A. I don't remember whether they asked me those questions or not.

Q. Well, at the time that you were shown pictures, did you ever discuss anything with them more than just the identification of the pictures?

A. I don't believe so.

• • • • • • •

[fol. 255] Q. Well, how about Miss Babick?

A. Miss Babick, yes.

Q. And you told her what you had seen?

A. Yes.

Q. Did you tell anyone else what you had seen, of the members of the bank, the employees?

A. I probably did.

Q. How about Mr. Mazaika?

A. Did I discuss it with him?

Q. Yes.

A. No, I don't believe I did.

Q. At the time that you viewed the pictures, the first time, the snapshots, how many snapshots did you view, altogether, would you say?

A. Approximately, oh, I would say, probably fifty or more.

Q. Fifty?

A. Or probably more.

Q. Fifty?

A. Yes.

Q. Did anyone, except the man you identified as Simmons, have more than one snapshot?

A. Would you rephrase that, please?

Q. Well, was any man depicted, in these pictures that [fol. 256] you viewed, depicted more than once, depicted in more than one picture, except Simmons?

A. This, I am not sure of.

* * * * * * *

Q. Approximately how long after that? Would that have been a week, within a week, a month, three months—

[fol. 257] A. Well, they came quite often with pictures to show us, to be sure that we identified the right person.

Q. Right. Did they show you more pictures of Simmons?

A. They showed us pictures of him, with others.

Q. Right. Did they show you additional pictures of Simmons than the three snapshots?

A. Yes.

Mr. Dunne: Objection, Your Honor. Her testimony was that she said that she saw—there is no testimony that she saw more than one. She said that she was uncertain about that. I will object to misstating the evidence.

The Court: I will sustain the objection as it is framed.

Mr. Smith: All right. I think that she has answered.

By Mr. Smith:

Q. Did they show you pictures of Simmons at a later time, pictures other than the pictures that they had shown you at the first day, or, on the first day?

[fol. 258] A. I am sorry, I cannot answer that.

Q. Did you see any pictures of Simmons, outside of the snapshots?

A. Yes.

Q. Did you see pictures, outside of snapshots, the first day that you looked at the pictures?

A. I believe I said that I did not remember, that I did not remember whether he brought only snapshots or other pictures at that time.

Q. All right. How many times did you view pictures—

A. Several times.

Q. Several times?

A. Yes.

Mr. Dunne: Objection, Your Honor; asked and answered.

The Court: Overruled.

By Mr. Smith:

Q. During these several occasions, were additional pictures of Simmons brought to you, other than you had seen before, the first or second time?

Mr. Dunne: Objection; asked and answered.

Mr. Smith: No, it has not been asked and answered.

[fol. 259] The Court: She may answer.

By the Witness:

A. How was that, now?

By Mr. Smith:

Q. After the first and second time, on the several occasions, did they bring pictures to you other than—of Simmons—other than they had shown you on the first or second occasion?

A. This, I believe, I answered before, sir. I said that I didn't remember whether those were the same pictures; but they did bring pictures of Simmons, and others besides.

Q. Did they ever bring you pictures of Garrett?

A. Yes.

Q. So Garrett was one of the others that they brought to you, is that right?

A. Yes. That is right.

Q. Did they ever bring you pictures of this man seated right over next to the lady (indicating)?

A. This, I could not tell you, because I did not know this man; and if they did bring me pictures, I didn't—I would not remember him.

Mr. Dunne: Let the record show that counsel is indicat-
[fol. 260] ing the defendant William Earl Andrews.

The Court: Yes.

* * * * * * *

[fol. 263] By Mr. Smith:

Q. (Continuing) Approximately how long, before today, was the last time you saw pictures of the defendants?

A. Yast year.

Q. Last year?

A. Yes.

Q. Well, I mean, in November or June or what?

A. Oh, I cannot say that.

Q. Were the pictures that they showed you, how were they dressed in those pictures, the man that you identified as Simmons?

[fol. 264] A. Dressed—in dress clothes.

Q. With a tie?

A. I am not sure.

Mr. Smith: Your Honor, with this witness, too, I request the pictures that she has testified to.

The Court: It will be unnecessary to keep making these motions.

Mr. Smith: All right.

The Court: I am not going to change my ruling.

* * * * * * *

[fol. 270] By Mr. Ginsberg:

Q. You did say that you were shown pictures of Mr. Garrett after the occurrence?

A. Yes.

Q. In your statement, you do not indicate anywhere that you recognized any of those pictures as being Mr. Garrett, is that correct?

A. I am not sure right now.

Mr. Ginsberg: May I show the statement?

[fol. 271] The Court: Yes.

(The witness' statement was shown to her)

By the Witness:

A. (Continuing) Yes; but it also does not say that I did not.

The Court: I didn't get that.

The Witness: I did not say I did not.

The Court: She has said nothing about it either way.

Is that right?

The Witness: No, not either way.

The Court: All right, that is all?

Mr. Ginsberg: That is all, yes. Thank you very much, Your Honor.

The Court: Yes.

Mr. Dunne? Thank you.

I won't take my one question, Judge.

The Court: All right.

Thank you, Mrs. Bialek.

(Witness excused)

Mr. Dunne: May I have the 3500 Statements back of Mrs. Bialek?

[fol. 272] (The counsel for defendants returned the Statements as requested above)

* * * * * * *

BERNICE PARLIAMAN, called as a witness by the Government, having been first duly sworn, was examined and testified as follows:

* * * * * * *

[fol. 284] Cross examination.

By Mr. Smith:

* * * * * * *

[fol. 288] Q. And when was the first time that you viewed pictures?

A. I might have been later that day, or the next day.

Q. Were you shown snapshots?

A. Yes.

Q. Were you shown snapshots which you identified as a man named Simmons?

A. Is Simmons the first gentleman?

Q. Well, did you identify the first man that you saw, as being one of the men—

A. I identified one photo that I thought, at that time, resembled him the most.

Q. The other photos didn't resemble him the most?

A. As far as I could see, no.

Q. And you were shown more than one photograph of the man you now say is Mr. Simmons, isn't that right?

A. Yes.

Q. The other two photographs didn't resemble him, the man who was in the bank?

[fol. 289] A. It didn't appear to me as if he was the one. May I state why?

Q. Well, Mr. Dunne will certainly ask that question, on cross examination.

When is the next time that you viewed pictures?

A. Oh, within a period of maybe two, three days later. We were shown pictures, I would say, at an interval of a week.

Q. The next time was about a week later?

A. Well, about a week.

Q. Right. And did you see any other—more pictures of Simmons, at that time?

A. Yes.

Q. Other than the ones that you had been shown the first day?

A. No.

Q. Were you shown more than one photograph of Simmons at that time?

A. Yes.

Q. Could you tell us what the conversation was at that time—in other words, the first time that you had identified it, and you thought one resembled and two did not.

[fol. 290] Now, you were shown the same pictures a week later, is that correct?

A. It was—yes, yes, it was.

Q. Were you told any more about the background of these men by the Federal Bureau of Investigation?

A. No, sir.

Q. Were you told anything more about what their investigation had revealed?

A. No, sir.

Q. Had you heard anything from any of the bank employees about a white Thunderbird?

A. Would you phrase that—I am sorry. Will you say that again?

Q. Had you found—had you heard anything from the other employees that the bank robbers were supposed to have a white Thunderbird?

A. Yes.

Q. Did you know that Simmons or Garrett, at the time that you viewed the pictures the second time, or the first time, were supposed to have been associated with a white Thunderbird?

Mr. Dunne: I think I will object to that, Your Honor.

The Court: Well, had anyone told you that?

[fol. 291] By Mr. Smith:

* * * * * * *

Q. Right. You knew what they had seen in the bank [fol. 292] robbery, and they knew what you had seen, is that right?

A. I imagine so.

Mr. Dunne: Objection.

The Court: I will sustain the objection to that question.

By Mr. Smith:

Q. On any of the—

Mr. Smith: Strike that.

By Mr. Smith:

Q. You testified that you saw the pictures, either the same day or the next day, and then about within the interval of a week. Did you, at any other time, see the pictures?

A. Before the case, before this case?

Q. Yes.

A. Yes.

Q. Where did you see them?

A. When I was subpoenaed.

Q. And when you came down to the office of the United States Attorney?

A. No, they came to my home.

Q. And they showed you—they showed you how many pictures at that time?

[fol. 293] A. Oh, I would say about four or five, maybe six.

Q. And three of them were of—

A. Do you mean of the one gentleman, or altogether? There were two gentlemen involved.

Q. Right. And they showed you altogether how many pictures?

A. Oh, I would say about seven.

Q. And all of the pictures were of either of the two gentlemen, either Mr. Garrett or Mr. Simmons—either of Mr. Garrett or Mr. Andrews?

A. Yes, sir.

Q. No other pictures were shown to you at that time?

A. No, sir.

Q. Did you have a discussion about the case at that time, when they came out to your home?

A. Just to make sure that the report that they had a year ago was correct, was as correct as I could remember it.

Q. Right. Did they take notes at that time of what you were saying?

A. No, sir.

Q. At the time that you first viewed pictures, either the [fol. 294] same day, or the day after, was any man in more than one picture, except the man named Simmons?

A. Do you mean, was he in a group photo?

Q. No. I am sorry.

A. I am sorry. I didn't understand.

Q. Simmons—they showed you three pictures of Simmons—

A. Now, are you speaking of right after the robbery, or are you speaking—

Q. Let's take the day after, the first day, or the same day, after the robbery. They showed you three pictures of Simmons?

A. I cannot remember just exactly how many they showed me that day, but there were more than—there were probably three or four.

Q. Of Simmons?

A. Well, I imagine so, it was Simmons.

Q. Outside of Simmons, did they show you more than one photograph of any other man?

A. Oh, yes.

Q. And was that Garrett?

A. Well, there was—I am not sure, at that time, whether there was any of Garrett.

* * * * * * *

[fol. 351] (Addressing the witness:) You may step down.

(Witness excused.)

(Whereupon the jury was excused, until the following day, after which the following further proceedings were had herein, in open Court, outside the presence and the hearing of the jury, as follows:)

The Court: All right.

Mr. Dunne: Your Honor, while all counsel and the defendants are here, I will ask, or perhaps Mr. Ginsberg, this is not the place, but I would ask Mr. Ginsberg if he would consider stipulating that the clothing which was in this suitcase which has been identified by your client as being the clothing identified by Mr. Garrett as being his clothing, then the—otherwise, I will have to call the court reporter to testify to that. He was present in court. He was present in court when Mr. Garrett testified under oath and that transcript, of course, would be admissible. It does not make any difference to me, it is just a question of—just so [fol. 352] that I can alert the court reporter and order the transcript. I have no feeling on it one way or the other.

I don't mean to press Mr. Ginsberg, I would just like to know now.

The Court: Why don't you let him think about it.

Mr. Dunne: Sure. I will order the transcript anyway.

The Court: You had better order the transcript.

Mr. Dunne: I would also like to inform the defense that I will probably have, depending upon the cross examination, that we will have only two or three more witnesses, probably only two.

The Court: We ought to finish tomorrow morning.

Mr. Dunne: Yes.

The Court: That is, finish the Government's case.

Mr. Dunne: That is right, finish the Government's case.

The Court: All right.

* * * * * * *

[fol. 356] You may proceed, Mr. Smith.

Mr. Smith: Thank you, your Honor.

BERNADINE DZIEDZIC, called as a witness on behalf of the Government, having been previously duly sworn, resumed the stand and testified further as follows:

Cross examination.

By Mr. Smith:

* * * * * * *

Q. After the bank robbery, were you shown pictures of [fol. 357] men?

A. Yes.

Q. When were you shown those pictures?

A. A day after the robbery and about three weeks later, three or four weeks later.

Q. How many pictures were you shown the first day after the robbery?

A. About five or six.

Q. Were any of those, did you identify any of those pictures as the man Simmons?

A. As the man Simmons, yes.

Q. Now, how many pictures of those five or six were of Simmons?

A. That I can recall? About two or three.

Q. I show you this gentleman.

Mr. Smith: For the record, it is Mr. Andrews next to Miss Coonrod.

By Mr. Smith:

Q. Did you see any pictures of him after the bank robbery?

A. I don't remember.

Q. Outside of Mr. Simmons in these six pictures, was any man in more than one picture?

[fol. 358] A. Of the two that you are speaking of or different men?

Q. No.

A. I don't understand.

Q. You were shown six pictures the day after the robbery, five or six pictures?

A. Yes.

Q. Two or three of them were of Mr. Simmons, is that right?

A. Yes.

Q. Is that right?

A. Yes.

Q. Now, the remaining three or four pictures, was one man in more than one of those three or four pictures?

A. Yes.

Q. How many men were altogether depicted in those five or six pictures?

A. I couldn't tell you how many; there were several. That is all I could say.

Q. Well, there were five or six pictures. Two or three of them were—

Mr. Dunne: Objection, your Honor. She answered the question.

[fol. 359] The Court: Well, the evidence is in the record. Now, what is your next question.

Mr. Smith: All right.

By Mr. Smith:

Q. About three weeks later, you saw pictures again, is that right?

A. Yes.

Q. Did you see the same two or three pictures of Simmons?

A. No, there were several other pictures, too.

Q. More pictures of Simmons?

Mr. Dunne: Objection, your Honor.

The Court: Well, just a moment. That is a question, I take it?

Mr. Smith: And you said yes?

Mr. Dunne: No, your Honor. She said there were several other pictures, too.

The Court: Just a moment. Counsel is entitled to examine her.

State your question so the witness understands the question.

Mr. Smith: Yes, I will.

By Mr. Smith:

[fol. 360] Q. Were there more than two or three pictures of Simmons at that time?

A. This is the second time that I saw the pictures?

Q. The second time, that is right.

A. I couldn't be certain of that.

Q. Well, did you say a moment ago that there were more than two or three pictures of Simmons?

Mr. Dunne: Objection, your Honor.

The Court: I will sustain the objection. What she said is in the record.

By Mr. Smith:

Q. Did you see any pictures other than those two times?

A. No.

Q. You didn't see—did Mr. Dunne ever come to you and ask you about this case, to your house and ask you about this case?

A. He didn't come to my house.

Q. Did he come to the bank?

A. Yes, to the bank.

Q. Did he show you pictures at that time?

A. Yes, he did.

* * * * * * *

[fol. 437] JOHN P. QUINLAN, called as a witness on behalf of the Government, and having been previously duly sworn, resumed the stand and testified further as follows:

* * * * * * *

[fol. 442] Cross examination.

By Mr. Smith:

Q. Agent Quinlan, did you obtain some snapshots from Pat Jones?

A. Yes, sir, I did.

Q. How many snapshots did you obtain?

A. Now, sir, you say I personally. It was on the following day on the 28th of February, we went there at about 9:00 in the morning and there were about five of us. She went through her scrapbook and came up with three or four pictures some of which maybe she gave me one, another agent one, and they were all collectively given to the man that was running that phase of the investigation, the other agent.

Q. The three or four pictures, who were they of?

A. Sir, they were of her brother Earl Andrews, one I know was in a jacket and a hat. I believe a second one was of Earl Andrews, too.

Q. Were there some pictures of Simmons, too?

A. I don't know. There may have been, I don't know.

[fol. 443] Q. But you think that you and the group that was there obtained four or five pictures?

A. Yes, sir.

Q. And you didn't see all the pictures, is that right?

A. Yes, sir. That is an accurate statement. I didn't see them all.

* * * * * * *

[fol. 670] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 671]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 15223-24-25

SEPTEMBER TERM, 1966 SEPTEMBER SESSION, 1966

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ROBERT JAMES GARRETT, THOMAS EARL SIMMONS and WILLIAM EARL ANDREWS, Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION—DECEMBER 7, 1966

Before HASTINGS, *Chief Judge,* DUFFY, *Senior Circuit Judge,* and SCHNACKENBERG, *Circuit Judge.*

SCHNACKENBERG, *Circuit Judge.* Defendants, Robert James Garrett, William Earl Andrews and Thomas Earl Simmons, severally appeal from judgments entered by the district court, on April 6, 1965, based upon a trial by jury, convicting them of robbery on February 27, 1964 of a savings and loan association whose accounts were insured by the Federal Savings and Loan Insurance Corporation, in violation of Title 18 U.S.C. § 2113, said defendants then being armed with dangerous weapons, to-wit, firearms, as charged in an indictment filed March 3, 1964.

[fol. 672] It appeared from evidence introduced out of the jury's presence on defendant Garrett's motion to suppress that during the afternoon of February 27, 1964, six men forced their way into the home of Mrs. Mahon, the mother

of defendant Andrews, and after ransacking the house without permission, they suddenly left without taking anything. Thereafter, at about 6:30 P.M. FBI agents Huntington and Quinlan came to that house without a warrant and went to the basement where they saw two suitcases in which money wrappers and other incriminating evidence were found. The men took one of the suitcases with them. While they were in the house they "looked and searched everything". On cross-examination Mrs. Mahon testified that the men took both suitcases, which were not owned by her, and in fact she did not know how they got there, because she did not give anybody permission to put them there.

Mrs. Mahon further testified that, when these agents said there was something in the basement that they wanted, she did not know that a suitcase was there, so they went down and she followed. She testified that she did not on that day give anybody permission to put the suitcases in her house, specifically a brownish suitcase (Government's Group Exhibit No. 4). Her answer was the same as to another suitcase marked Government Group Exhibit No. 3.

She also testified that Andrews was not in her home that day.

At the hearing on said motion, Garrett testified in substance that a suitcase (the one marked Government's Group Exhibit No. 4) *belonging to him* was removed from the home of Mrs. Mahon on February 27, 1964 and that he (Garrett) did not consent to said removal.

1. Garrett charges that the district court thereafter erred in admitting *in the presence of the jury* a reading by the court reporter of the testimony of Garrett in support of his motion for suppression of the evidence seized without a warrant.

In the course of his reasoning Garrett's counsel urges upon us that

> [fol. 673] "To protect his Fourth Amendment rights against unreasonable search and seizure, defendant [Garrett] was obliged to take the stand and assert

ownership in one of the suitcases seized by the F.B.I. agents without a warrant. In order that the defendant Garrett have the proper standing to make the objection, it was essential that he so testify. Over objection, however, the trial court allowed the transcript of Garrett's testimony in support of his motion to be read to the jury, and thus the fatal link identifying him with the suitcase and its contents was established. To thus force the defendant Garrett to barter away his rights against self-incrimination in return for the opportunity to assert his Fourth Amendment rights is a violation not only of the right against self-incrimination, but of the right to due process itself."

His counsel contends that, in deciding to testify for the purpose of establishing Garrett's ownership of the suitcase, at the risk of having that testimony used against him upon the issue of guilt, he was required to and did resolve a dilemma. However, counsel has shown no dilemma, because he never has shown that there was no other way for him to prove Garrett's ownership of the suitcase. It is a matter of common knowledge that the fact of ownership of such an object as a suitcase might be proved in numerous ways, viz: testimony or documentary evidence of a purchase thereof by the alleged owner, open possession and the use thereof by him or other circumstances so commonplace as to be unnecessary to enumerate. Moreover, the choice of a solution for a dilemma (if we assume that one existed) was for Garrett's attorney, and he made a decision. He was confronted with an indictment charging Garrett with a criminal offense. Even if there were no other evidence of ownership available, Garrett voluntarily testified in support of his motion to suppress and he could not thereafter rely on the fifth amendment to bar consideration by the trier of facts of that testimony, if relevant (which it was), in the trial of the criminal charge against him.

Faced with an indictment charging him with a criminal offense, defendant Garrett was entitled to, and had, a trial

by jury. But, although defense counsel had the usual prob-
[fol. 674] lem of whether to call defendant as a witness to prove ownership on the motion to suppress, it does not follow from the fact that defendant did testify that what he then said was improperly submitted to the trial jury on the issue of his alleged guilt. It was certainly relevant. The testimony was voluntary and given under the guidance of his own counsel. To hold otherwise, we would in effect be attempting to create a "judicial amendment" to the constition to protect persons from the risks of errors of judgment in trial tactics. That is neither our office nor our inclination. We hold that no error occurred in the district court in respect to this matter.

To the same effect is the result reached in *Heller* v. *United States,* 7 Cir., 57 F. 2d 627 (1932), at 629, cert. denied 286 U.S. 567.

Our decision is not contrary to the holding in *Green* v. *United States,* 355 U.S. 184 (1957), cited by defendant.

2. Defendant Garrett contends that his suitcase was "improperly introduced in evidence because (a) the suitcase had not been 'abandoned' by the defendant, (b) it was seized by F.B.I. agents without a warrant, and (c) it was seized without the defendant's permission."

We believe that the evidence shows that Mrs. Mahon, in whose basement the suitcase was found, was in possession of Garrett's suitcases and that she consented impliedly to their search and seizure. *Cutting* v. *United States,* 9 Cir., 169 F. 2d 951, 952 (1948); *United States* v. *Walker,* 2 Cir., 197 F. 2d 287, 289 (1952), cert. denied 344 U.S. 877. Agent Huntington testified that "she led the search".

In *Marshall* v. *United States,* 9 Cir., 352 F. 2d 1013, 1014 (1965), cert. denied 382 U.S. 1010, F.B.I. agents obtained the possession of a brief case of defendant left in the possession of his landlady for safekeeping. The court said, at 1015:

> "None of this, however, is meant to mean that a man's briefcase is never secure against unreasonable search

> and seizure, but when *possession and control of his briefcase is given by a man to another person we think that man accepts the risk that the other person will* [fol. 675] *consent to a search and seizure of it and, under the circumstances that exist in this case, such consent is valid.* * * * (Emphasis supplied.)

While counsel for Garrett cites *United States* v. *Jeffers*, 342 U.S. 48 (1951), we hold that *Jeffers* is distinguishable because it involved the entry of a hotel room of the aunts of defendant therein by officers while the tenants were absent from the premises. In the case at bar a private home was searched while the homeowner was present, gave permission and led the search.

3. Counsel for defendant William Earl Andrews, a son of Mrs. Mahon, in this court emphasizes that the government, in attempting to prove the identity of the robbers of the loan association, produced an employee thereof who saw two men leave after the robbery in a 1960 Thunderbird, which was identified as belonging to a sister of defendant Andrews.

The government evidence against Andrews was that he borrowed his sister's Thunderbird about 11:30 A.M. on the day of the robbery and returned it about 2:30 P.M. of the same day, that a similar car was seen outside the scene of the crime by a teller who ran out after the two robbers. The latter witness testified he saw only two men in the car and that one of them was defendant Simmons. Other eyewitnesses saw the second robber while inside the Association and later identified him as defendant Garrett.

We find there is on the record no sufficient evidence to justify conviction of defendant Andrews as an aider and abettor of the alleged robbery.

4. Defendant Simmons, testifying in his own behalf, denied that he was at the Association on February 27, 1964. Five Association employees who saw the men who conducted the holdup pointed out defendant Simmons in the court-

room. It is the contention of defense counsel that all of these witnesses, when identifying Simmons, were able to do so only because they had viewed certain snapshots of him which were in the hands of F.B.I. agents. It is further urged that the snapshots were shown to the witnesses in such manner that Simmons dominated those shown in the group of pictures viewed by these witnesses. However, [fol. 676] these government witnesses underwent a cross-examination by defense counsel and we believed the record reveals that the weight to be given the identification testimony of the government witnesses was properly entrusted to the jury. Certainly we are not convinced, in view of the jury's verdict, that the record shows without question that the Association employees were improperly led to identify Simmons as one of the robbers by the showing of these snapshots to the government witnesses who identified Simmons.

Counsel for Simmons also contends that the Jencks Act required the prosecutor to tender to the defense "the pictures along with the statements".

As we said in *United States* v. *Sopher*, 362 F. 2d 523 (1966), cert. denied November 7, 1966, 35 LW 3162, 18 U.S.C.A. § 3500 (e) applies to a written statement made by a witness and signed or otherwise adopted or approved by him, or a recording or transcription thereof.

There is nothing in the Jencks Act which includes a photograph which is not a part of a statement as there defined. To the same effect is *Ahlstedt* v. *United States*, 5 Cir., 325 F. 2d 257, 259 (1963), cert. denied 377 U.S. 968.

5. A few remaining points raised in briefs of defendants we find lack merit.

As to defendant Andrews, the judgment from which he appealed is reversed.

As to the remaining defendants who have appealed, the judgments of the district court are affirmed.

Affirmed in Part and Reversed in Part.

[fol. 677]

IN UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. John S. Hastings, Chief Judge; Hon. F. Ryan Duffy, Senior Circuit Judge; Hon. Elmer J. Schnackenberg, Circuit Judge.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

ROBERT JAMES GARRETT, THOMAS EARL SIMMONS and WILLIAM EARL ANDREWS, Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

JUDGMENT—December 7, 1966

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court as to defendant Andrews, in this cause appealed from be, and the same is hereby, Reversed, and the judgments of the District Court as to the remaining defendants, Garrett and Simmons, be, and the same are hereby Affirmed, in accordance with the opinion of this Court filed this day.

[fol. 678]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before: Hon. John S. Hastings, Chief Judge; Hon. F. Ryan Duffy, Senior Circuit Judge; Hon. Elmer J. Schnackenberg, Circuit Judge.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ROBERT JAMES GARRETT, et al., Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER DENYING PETITION FOR REHEARING—January 23, 1967

It Is Ordered by the Court that the petition for rehearing filed in this cause by the defendants-appellants herein be, and the same is hereby Denied.

[fol. 679] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 680]

SUPREME COURT OF THE UNITED STATES

No. 1087—October Term, 1966

THOMAS EARL SIMMONS, et al., Petitioners,

v.

UNITED STATES

ORDER ALLOWING CERTIORARI—June 12, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted; and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

55

No. 1087

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

THOMAS EARL SIMMONS and ROBERT JAMES GARRETT,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

THOMAS EARL SIMMONS and ROBERT JAMES GARRETT,
Petitioners,

VS.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Thomas Earl Simmons and Robert James Garrett, pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in the above entitled cause, dated December 7, 1966, affirmed the judgment of conviction which was entered by the United States District Court for the Northern District of Illinois. The opinion of the Court of Appeals (not yet reported) is reprinted as Appendix A, *infra*. The judgment order of the Court of Appeals was entered December 7, 1966 and is reprinted as Appendix B, *infra*. A Petition for Rehearing was timely filed but was denied by order dated January 23, 1967, which order is reprinted as Appendix C, *infra*.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, entered on December 7, 1966, affirmed the judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division. On December 20, 1966, the Court of Appeals extended the time for the filing of Petitioners' Petition for Rehearing to and including January 16, 1967. Said Petition for Rehearing was filed on January 13, 1967. On January 23, 1967, the Court of Appeals denied Petitioners' Petition for Rehearing. This Petition for a Writ of Certiorari is filed within thirty days of the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Where investigative techniques of Federal agents focus the attention of identification witnesses on one particular suspect, have the standards of fairness required by due process been met?

2. Did the trial court err in refusing a defense request under Section 3500 of Title 18, United States Code, for pictures used in obtaining pre-trial statements from government witnesses subsequently incorporated by reference into the witnesses' statements, where identity was the vital issue of the trial?

3. Should a defendant who testifies to enforce his constitutional rights guaranteed by the Fourth Amendment be required to sacrifice his rights under the Fifth Amendment?

AMENDMENT IV TO UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V TO UNITED STATES CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Nature of the Case and its Disposition:

This case was commenced by an indictment which was returned against the Petitioners and another defendant, William Andrews. The indictment charged the Petitioners and Andrews with taking a sum of money from a federally insured savings and loan association in violation of Section 2113, Title 18 of the United States Code (Count I); (b) with putting the lives of employees of the same savings and loan association in jeopardy by the use of danerous weapons in violation of Section 2113, Title 18 of the United States Code (Count II). (A. 1). The Petitioners' trial resulted in the jury's verdict of guilty as charged in both Counts of the indictment. Upon the return of the verdict of guilty, Petitioners were sentenced to the custody of the Attorney General for imprisonment for a period of ten years. Notice of Appeal on behalf of the Petitioner Robert James Garrett was timely filed. Notice of Appeal on behalf of the Petitioner, Thomas Earl Simmons was timely filed.

On December 7, 1966, the Court of Appeals entered a decision which affirmed the judgment of the Petitioners' convictions but reversed without remand the conviction of the Defendant, William Andrews. (Appendix A, *infra.*) Petitioners timely filed a Petition for Rehearing which was denied by order dated January 23, 1967 (Appendix C, *infra*). Thereafter, this Petition for Certiorari was timely filed.

B. The Evidence:

On February 27, 1964, two men, later identified as Simmons and Garrett, entered the Ben Franklin Savings and Loan Association, 4812 South Pulaski Road, Chicago, and asked for a money order. (A. 6). One of the men then thrust a gun through one of the teller windows, handing the teller a blue bag and demanding that she "sack it or stack it." (A. 29). The teller filled the bag with some $1,500, and the two men fled. (A. 29, 34). An employee of the savings and loan followed the men outside into the street and saw them drive away in a white 1960 Thunderbird.

A similar Thunderbird was identified soon after the robbery as belonging to Mary Ruth Rey, a sister of defendant, Andrews. (A. 15). Andrews had borrowed the car from his sister on the day of the robbery at about 11:30 a.m. to drive to Indiana. He returned it at 2:30 p.m., according to Helen Scapardine who was using the car while Mrs. Rey was in the hospital. (T. 27-32).

The next day the F.B.I. obtained from Patricia Schuster, another sister of Andrews, several snapshots of Simmons. Patricia Schuster is also Simmons' sister-in-law. (A. 41-42). These pictures were then shown to each of the savings and loan employees who later at the trial identified Simmons as one of the robbers. (A. 8, 18, 26-27, 31, 34-35). Three of the witnesses also viewed the snapshots immediately before they testified. (T. 252, A. 31, T. 360). There was never a line-up or any other kind of personal confrontation and identification of any of the defendants prior to the trial of the case.

At approximately three o'clock in the afternoon of February 1, 1965, six men with drawn guns forced their way into the home of Mrs. Mahon, the mother of the defend-

ant, Andrews. After ransacking the house without permission, they suddenly left, taking nothing. (T. 209). Then, at about 6:30 p.m., agents Huntington and Quinlan of the F.B.I. arrived at Mrs. Mahon's house, without a warrant (T. 224), and went directly to the basement where they found two suitcases in which money wrappers and other incriminating evidence were found. Mrs. Mahon stated that she gave no permission, and asked them not to take anything (T. 213-14). Agent Huntington said that they had consent, and that they were escorted to the basement where the suitcases were found (T. 230-31). They had "no idea" there was a suitcase there at the time (T. 232). At trial, the Petitioner Garrett moved to suppress the suitcases as evidence, and took the stand in his own behalf to testify that one of the suitcases was his (T. 183-205). The suitcase had been left at the home of Mrs. Mahon on the morning of February 27, 1964, and Garrett at no time consented to its removal from the premises of his friend's mother (T. 203-04).

During the trial, Mr. Betts, the Court Reporter, was called by the Government and read to the jury the transcript he had made of the testimony of the Petitioner Garrett during the hearing on suppression of the evidence seized without a warrant. (T. 386-400). This was done over the objection of counsel for the Petitioner Garrett. (T. 374-85).

Petitioner Simmons swore that he was not in the savings and loan on February 27, 1964. He said that he arrived in Chicago that day along with Garrett and Andrews and went to the home of Pat Schuster, his sister-in-law. After visiting with Pat Schuster for about an hour, Simmons went with the other two men to a tavern for a beer. Andrews left the two others to pick up the borrowed car. When

the three left the tavern, Simmons went alone to a drive-in for a sandwich. He then went to another tavern for about an hour and then walked back to Pat Schuster's house to pick up his suitcase, arriving there about 2:30 p.m. Simmons further testified that Andrews and Garrett, who had planned to use the borrowed car for a trip to Indiana, arrived back at Pat Jones' house fifteen minutes later. Joe Franz, proprietor of a newspaper circulation office located nearby, then came and told Simmons that the police were looking for him. Franz, who was questioned by the F.B.I. for six hours but never charged with anything (A. 16), arranged transportation for Simmons to Indiana. Simmons boarded a bus in Indiana for Tennessee (A. 44-46).

REASONS FOR GRANTING THE WRIT

WHERE THE INVESTIGATIVE TECHNIQUES OF FEDERAL AGENTS FOCUSED THE ATTENTION OF IDENTIFICATION WITNESSES ON ONE PARTICULAR SUSPECT, THE STANDARDS OF FAIRNESS REQUIRED BY DUE PROCESS WERE NOT MET

The most important safeguard against the conviction of an innocent citizen is an unbiased, impartial police investigation. This is particularly true where it is not the suspect's intent but his identity that the investigation seeks to reveal. An undue focusing of attention on one particular suspect in the early stages of investigation can indelibly imprint on a witness's mind an incorrect picture of the perpetrator of an offense.

The police agency in this case, the Federal Bureau of Investigation, must be forcefully told that their zeal to secure an identification cannot be allowed to destroy the possibility of an objective impartial judgment by an accusing witness. The police technique must meet with the requirements of decency and fairness established as the fundamental law of the land.

The primary issue presented at the trial of the case was identity. Two men robbed the Franklin Savings and Loan on February 27, 1964. Mr. Mazaika, an employee of the savings and loan, saw the two men leave after the robbery in a 1960 Thunderbird. Mr. Mazaika said that the car had a big scrape along the door on the passenger side. (A. 7). The police immediately searched the area to locate the described automobile (A. 15).

At about 2:30 p.m., this search led to a Thunderbird owned by Mary Ruth Rey, sister of defendant, William Andrews. (A. 15). At about 3:00 p.m., the home of Andrews' mother was searched. (A. 22). The next day the F.B.I. obtained snapshots of Andrews and Simmons from Pat Jones, another sister of Andrews. (A. 42). Each savings and loan employee viewed these snapshots on the 28th or shortly thereafter. (A. 8, 18, 26-27, 31, 34-35). Snapshots of Simmons were shown to the employees several other times by both the F.B.I. and the prosecutor. It is, therefore, clear that all the witnesses identified Simmons as one of the robbers only by viewing these snapshots.

From what little evidence the trial court permitted on the manner in which Simmons was identified as one of the robbers, the F.B.I.'s investigative procedure is significant in two respects.

First, during cross-examination all five of the bank employees who identified Simmons revealed that they began focusing on Simmons when the F.B.I. showed them a group of five or six snapshots, of which several were photos of Thomas Simmons. Phillip Mazaika said he saw five or six snapshots of which two were photos of Simmons. (T. 56, 79). Florence Babick said she saw three pictures of Simmons. (T. 155). Mary Bialek, who viewed pictures several times before the trial, said she saw several pictures of Simmons. (T. 258). Bernice Parliaman remembered that she saw three or four pictures of Simmons among the seven she viewed (T. 294). And, Bernice Dziedzic saw two or three pictures of Simmons among the six pictures she viewed after the robbery. Thus, the memory of each of the identifying witnesses was prodded by the repeated appearance of Simmons' face among the pictures used by the F.B.I. in its search for the robbers.

Second, the memory of the identifying witnesses was further refreshed by visits with the prosecutor immediately before the trial in which the witnesses again viewed pictures. Again Simmons dominated the small group of pictures viewed by the witnesses. Mary Bialek testified that she viewed pictures of Simmons the day before she testified and identified him in Court. (T. 252). Bernice Parliaman said she viewed six pictures, all of them either of Simmons or of Andrews, when she was served with a subpoena to testify. Bernadine Dziedzic also viewed pictures of Simmons a week and a half before the trial when the Assistant United States Attorney visited her at the savings and loan with four pictures (T. 360).

We submit that this procedure was manifestly unfair to defendants. In scrutinizing investigative procedures involving the identification of a suspect by an eyewitness, the courts have been particularly sensitive to overreaching by the police which focuses the witness' attention on a particular suspect.

In *Palmer* v. *Peyton*, ... F.2d ..... (4th Cir., 1966, No. 9609), a rape victim was reversed because the sheriff unduly focused the victim's attention on the accused. Without allowing the accused to confront or to be confronted by his accuser, the sheriff directed the accused to repeat certain phrases the victim alleged were uttered in the course of the attack. After hearing only the lone suspect repeat the phrases, the victim readily identified the suspect as her assailant. The Court particularly noted the fact that the accuser was not given alternative choices and was never required to pick her assailant from a lineup of suspects. The court sitting *en banc* concluded that the suspect, at the most critical point of the proceedings against him, was deprived of the most elementary safeguards of the law.

A conviction was reversed on similar grounds in *People* v. *Hoffner*, 208 Misc. 17, 129 N.Y.S. 2d 833 (1942).

From the abbreviated evidence allowed in the trial, it is clear that the F.B.I. unduly focused the attention of the eyewitnesses on Simmons by inserting several pictures of him into the small group of pictures viewed by the witnesses. We submit that the conviction which resulted from these investigative procedures must be reversed and a new trial granted.

The decision of the Court of Appeals attempts to answer this contention by stating:

> "However, these government witnesses underwent a cross-examination by defense counsel and we believe, the record reveals that the weight to be given the identification testimony of the government witnesses was properly entrusted to the jury. Certainly, we are not convinced in view of the jury's verdict, that the record shows without question that the Association employees were improperly led to identify Simmons as one of the robbers by the showing of these snapshots to the government witnesses who identified Simmons." (Appendix A. p. 7).

Certainly cross-examination is not an adequate remedy for a deprivation of constitutional rights. If this were the case, federal agents could make a practice of ignoring constitutional rights and then challenge a defendant's counsel to attempt to extricate his client after the damage had already been done. In the dissent in *Gilbert* v. *United States,* 366 F.3d 923 (10th Cir., 1966), Judge Browning states at Page 956,

> ". . . it could not be realistically contended that subsequent interrogation of the witnesses to secret lineup would serve as a reasonable substitute . . . The burden rested upon the appellant to establish that the lineup was illegal and that there was a reasonable possibility that attendance of witnesses at the lineup tainted the court room identification. The burden would then

pass to the Government to convince the trial court that the evidence was free of taint."

Under the *Palmer* case, the identification here was shown to be illegal and therefore, cross-examination was not a remedy.

THE TRIAL COURT ERRED IN REFUSING A DEFENSE REQUEST UNDER SECTION 3500 OF TITLE 18, UNITED STATES CODE FOR PICTURES USED IN OBTAINING PRE-TRIAL STATEMENTS FROM GOVERNMENT WITNESSES SUBSEQUENTLY INCORPORATED BY REFERENCE INTO THE WITNESSES' WRITTEN STATEMENTS WHERE IDENTITY WAS THE VITAL ISSUE OF THE TRIAL.

The purpose of Title 18, Section 3500 of the United States Code was to further fair and just administration of criminal justice. *Campbell* v. *United States,* 373 U.S. 487 (1963). A defendant is given the opportunity to completely develop the underlying foundation for a witness' testimony on direct examination through the use of a prior statement. A jury is able to determine how much weight is to be given a particular witness.

Since the identity of the robbers was the entire issue of the trial a full disclosure of the manner in which the defendants were identified was vital. There is no question that photographs were used by F.B.I. agents to obtain statements from the witnesses. It is also certain that the witnesses incorporated the pictures by reference in their statements. Therefore, counsel for the Petitioner Simmons requested the photographs pursuant to Title 18, Section 3500 United States Code. The trial court denied this request.

The statements of the various witnesses varied on the number of pictures they saw of the defendants. There was an even greater variance on the total number of pictures exhibited to the witnesses. In fact, it is not even clear that some witnesses viewed pictures of anyone other than a defendant.

From the prosecutor's own statements and the limited cross-examination of the witnesses identifying Petitioner Simmons, there must have been grave doubt in the minds both of the trial judge and the jurors on the procedures used to identify Simmons. The prosecutor said there was a "multitude" of pictures involved in the procedure. (T. 81). One witness said she saw fifty (T. 255). But all four other witnesses said they saw only about five or six. Obviously the production of the pictures by the prosecution would have greatly aided the defense cross-examination of the witnesses to establish for the court and jury exactly what led to the identification of Simmons and the other defendants.

Although the Assistant United States Attorney indicated he was willing to make available to the defense the groups of pictures used by government agents as they focussed witnesses' attention on defendants (T. 81), the trial court decided *sua sponte* that the defense would not be permitted to use the groups of pictures in cross-examination of the identifying witnesses. (T. 92, 148). As a result, the defense was denied access to evidence in the possession of the government. Nor was it ever determined whether the government had properly retained the groups of pictures to allow full disclosure of the manner in which the defendants were identified. The trial court did not even inspect the pictures *in camera*.

Since the photographs of Simmons were of a limited number, all were relevant to the case on trial, all were re-

ferred to in the witnesses' 3500 statements and all were available to be produced by the prosecutor, the trial court erred in refusing to allow the Government's tender of the photographs.

A DEFENDANT WHO TESTIFIES TO ENFORCE HIS CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FOURTH AMENDMENT SHOULD NOT BE REQUIRED TO SACRIFICE HIS RIGHTS UNDER THE FIFTH AMENDMENT.

To protect his Fourth Amendment rights against unreasonable search and seizure, Garrett was obliged to take the stand and assert ownership in one of the suitcases seized by the F.B.I. agents without a warrant. In order that the Petitioner Garrett have the proper standing to make the objection, it was essential that he so testify. Over objection, however, the trial court allowed the transcript of Garrett's testimony in support of his motion to be read to the jury, and thus the fatal link identifying him with the suitcase and its contents was established. To thus force the defendant Garrett to barter away his rights against self-incrimination in return for the opportunity to assert his Fourth Amendment rights is a violation not only of the right against self-incrimination, but of the right to due process itself.

The identification of the defendant Garrett with the suitcase containing the money wrappers and the other incriminating evidence must have made a vivid impression on the jury. If this evidence was improperly admitted, there exists far more than the "reasonable possibility" that the evidence contributed to the conviction which is necessary for reversal. *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963).

On superficial examination, it would appear that this issue has been decided in *Heller* v. *United States,* 57 F.2d 627 (7th Cir., 1932). There a conviction was affirmed in these words:

> "Having voluntarily become a witness upon one issue in the case, what he there testified may thereafter be shown against him upon trial of any other issue therein." 57 F.2d 627 at 629.

In a strong and cogent dissent, however, Judge Evans points out that it was necessary for the appellant to make application for the return of the allegedly unlawfully seized property in order to protect himself against the use of such evidence. Judge Evans concludes:

> "The evidence thus given to support such petition is received for no other reason than to protect a constitutional right granted the accused by the Fourth Amendment. If such testimony can only come from the lips of the accused, then his testimony, as well as his petition, should not be used against him." 57 F. 2d 627 at 630.

A recent decision which is pertinent is *Cristensen* v. *United States,* 259 F. 2d 192 (D.C. Cir., 1958). While the majority affirms convictions in a four-paragraph opinion on the grounds of sufficiency of evidence, Judge Bazelon, dissenting, focuses on the exact issue of the present case in a well-reasoned nine-page opinion. It would be presumptive in the present brief to attempt to improve upon the scholarly analysis of Judge Bazelon of the law of searches and seizures as applied to the very issue here on appeal. Let it suffice to say that Judge Bazelon, with reference to Judge Evan's dissent in *Heller, supra,* points out that no distinction is made between situations where the motion to suppress has been overruled and those where

it has been sustained. To summarize, Judge Bazelon states the problem thusly:

> "We place the victim of the search upon the horns of a dilemma. If he does not claim possession of the seized contraband, we allow it to be used in evidence against him. If he does claim possession of the contraband, we let his own claim convict him.
>
> "To be sure, the Fourth Amendment right to be free from unreasonable search and seizure is a right that may be waived. So also is the Fifth Amendment right not to be compelled to incriminate one's self. But a rule which compels the defendant to forego one of his two constitutional rights as a condition to exercise of the other is, in my opinion, invalid." 259 F. 2d 192 at 197 (Citations omitted, emphasis in original).

The problem cannot be answered by arguing that the Fourth and Fifth Amendments stand apart from each other. This argument was put to rest in *Davis* v. *United States,* 328 U.S. 582 (1946) wherein Justice Frankfurter said:

> "The law of searches and seizures as revealed in the decision of this Court is the product of the interplay of these two constitutional provisions. *Boyd* v. *United States,* 116 U.S. 616. It reflects a dual purpose-protection of the privacy of the individual, his right to be let alone, protection of the individual against compulsory production of evidence to be used against him." 329 U.S. 582 at 587.

In the present case, the petitioner Garrett was forced to barter his constitutional protection against an unlawful search and seizure as the price of his good faith effort to exclude the evidence the Government had obtained by a warrantless search. He had no choice; he was forced to take a desperate chance in order to secure the exclusion of the evidence. Failing in his proof, he has been forced

to pay an unconscionable price. The identification of the suitcase and its contents was tantamount to an admission of guilt.

United States Ex Rel. Hetenyi v. *Wilkins*, 348 F.2d 844 (2d Cir., 1965), in a notably careful and well-reasoned opinion, Judge Thurgood Marshall examines the fairness of placing a criminal defendant on the horns of such a dilemma, and finds it contrary to the guarantees afforded by the Constitution. The opinion roundly condemns the "barter theory of fairness", stating that the Government's argument that the defendant somehow "agreed" to subject himself to re-prosecution if the conviction on the lesser charge were reversed would be "to ignore the elementary psychological realities of the situation." 348 F. 2d 844 at 859. In reply to the Government's arguments based on cases decided near the turn of the century, Judge Marshall outlines the immense strides that have been made in expanding the constitutional protections of the accused in the last few decades. Judge Marshall concludes:

> "(W)e would decline to follow them in applying the fundamental fairness standard, not merely because of their half century antiquity, but because we would not be faithful to the evolution of our social values if we reached any other conclusion." 348 F. 2d. 844 at 863.

The Court of Appeals' decision attempted to dispose of this contention by stating:

> "Moreover, the choice of a solution for a dilemma (if we assume that one existed) was for Garrett's attorney, and he made a decision . . . Faced with an indictment charging him with a criminal offense, defendant Garrett was entitled to, and had, a trial by jury . . . The testimony was voluntary and given under the guidance of his own counsel. To hold otherwise, we

would in effect be attempting to create a 'judicial amendment' to the constitution to protect persons from the risks of errors of judgment in trial *tactics.*" (Appendix A, p. 4).

This Court in so holding, is placing a burden and a risk on only one party to the lawsuit. The Government of the United States has the burden of proving its case. Looking at the case from this point of view, the trial court should have required the United States to prove its case independently of a windfall at the time of trial. If the Petitioner Garrett had testified in the defendant's case in chief, obviously this would be a matter of trial tactics and any information obtained from him on cross-examination would be binding against him. However, when the defendant Garrett attempted to avail himself of the constitutional safeguard against unlawful search and seizure, his action was not a matter of trial tactics. *United States* v. *Blalock*, 253 F. Supp. 860 (E.D. Pa. May 13, 1966); *People* v. *DeFilippis*, 34 Ill. 2d 129, 214 N.E. 2d 897 (March 23, 1966).

Therefore, the trial court erred in permitting the testimony of the Petitioner Garrett in support of his motion to suppress the evidence to be read to the jury as part of the Government's case in chief.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request this Court grant and issue its Writ of Certiorari for review of the decision below.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 15223-24-25

SEPTEMBER TERM, 1966 SEPTEMBER SESSION, 1966

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT JAMES GARRETT, THOMAS EARL SIMMONS and WILLIAM EARL ANDREWS,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

DECEMBER 7, 1966

Before HASTINGS, *Chief Judge,* DUFFY, *Senior Circuit Judge,* and SCHNACKENBERG, *Circuit Judge.*

SCHNACKENBERG, *Circuit Judge.* Defendants, Robert James Garrett, William Earl Andrews and Thomas Earl Simmons, severally appeal from judgments entered by the district court, on April 6, 1965, based upon a trial by jury, convicting them of robbery on February 27, 1964 of a savings and loan association whose accounts were insured by the Federal Savings and Loan Insurance Corporation, in violation of Title 18 U.S.C. § 2113, said defendants then being armed with dangerous weapons, to-wit, firearms, as charged in an indictment filed March 3, 1964.

It appeared from evidence introduced out of the jury's presence on defendant Garrett's motion to suppress that during the afternoon of February 27, 1964, six men forced their way into the home of Mrs. Mahon, the mother of defendant Andrews, and after ransacking the house without permission, they suddenly left without taking anything. Thereafter, at about 6:30 P.M. FBI agents Huntington and Quinlan came to that house without a warrant and went to the basement where they saw two suitcases in which money wrappers and other incriminating evidence were found. The men took one of the suitcases with them. While they were in the house they "looked and searched everything". On cross-examination Mrs. Mahon testified that the men took both suitcases, which were not owned by her, and in fact she did not know how they got there, because she did not give anybody permission to put them there.

Mrs. Mahon further testified that, when these agents said there was something in the basement that they wanted, she did not know that a suitcase was there, so they went down and she followed. She testified that she did not on that day give anybody permission to put the suitcases in her house, specifically a brownish suitcase (Government's Group Exhibit No. 4). Her answer was the same as to another suitcase marked Government Group Exhibit No. 3.

She also testified that Andrews was not in her home that day.

At the hearing on said motion, Garrett testified in substance that a suitcase (the one marked Government's Group Exhibit No. 4) *belonging to him* was removed from the home of Mrs. Mahon on February 27, 1964 and that he (Garrett) did not consent to said removal.

1. Garrett charges that the district court thereafter erred in admitting *in the presence of the jury* a reading by the court reporter of the testimony of Garrett in support of his motion for suppression of the evidence seized without a warrant.

In the course of his reasoning Garrett's counsel urges upon us that

> "To protect his Fourth Amendment rights against unreasonable search and seizure, defendant [Garrett] was obliged to take the stand and assert ownership in one of the suitcases seized by the F.B.I. agents without a warrant. In order that the defendant Garrett have the proper standing to make the objection, it was essential that he so testify. Over objection, however, the trial court allowed the transcript of Garrett's testimony in support of his motion to be read to the jury, and thus the fatal link identifying him with the suitcase and its contents was established. To thus force the defendant Garrett to barter away his rights against self-incrimination in return for the opportunity to assert his Fourth Amendment rights is a violation not only of the right against self-incrimination, but of the right to due process itself."

His counsel contends that, in deciding to testify for the purpose of establishing Garrett's ownership of the suitcase, at the risk of having that testimony used against him upon the issue of guilt, he was required to and did resolve a dilemma. However, counsel has shown no dilemma, because he never has shown that there was no other way for him to prove Garrett's ownership of the suitcase. It is a matter of common knowledge that the fact of ownership of such an object as a suitcase might be proved in numerous ways, viz: testimony or documen-

tary evidence of a purchase thereof by the alleged owner, open possession and the use thereof by him or other circumstances so commonplace as to be unnecessary to enumerate. Moreover, the choice of a solution for a dilemma (if we assume that one existed) was for Garrett's attorney, and he made a decision. He was confronted with an indictment charging Garrett with a criminal offense. Even if there were no other evidence of ownership available, Garrett voluntarily testified in support of his motion to suppress and he could not thereafter rely on the fifth amendment to bar consideration by the trier of facts of that testimony, if relevant (which it was), in the trial of the criminal charge against him.

Faced with an indictment charging him with a criminal offense, defendant Garrett was entitled to, and had, a trial by jury. But, although defense counsel had the usual problem of whether to call defendant as a witness to prove ownership on the motion to suppress, it does not follow from the fact that defendant did testify that what he then said was improperly submitted to the trial jury on the issue of his alleged guilt. It was certainly relevant. The testimony was voluntary and given under the guidance of his own counsel. To hold otherwise, we would in effect be attempting to create a "judicial amendment" to the constitution to protect persons from the risks of errors of judgment in trial tactics. That is neither our office nor our inclination. We hold that no error occurred in the district court in respect to this matter.

To the same effect is the result reached in *Heller* v. *United States,* 7 Cir., 57 F. 2d 627 (1932), at 629, cert. denied 286 U.S. 567.

Our decision is not contrary to the holding in *Green* v. *United States,* 355 U.S. 184 (1957), cited by defendant.

2. Defendant Garrett contends that his suitcase was "improperly introduced in evidence because (a) the suitcase had not been 'abandoned' by the defendant, (b) it was seized by F.B.I. agents without a warrant, and (c) it was seized without the defendant's permission."

We believe that the evidence shows that Mrs. Mahon, in whose basement the suitcase was found, was in possession of Garrett's suitcases and that she consented impliedly to their search and seizure. *Cutting* v. *United States,* 9 Cir., 169 F. 2d 951, 952 (1948); *United States* v. *Walker,* 2 Cir., 197 F. 2d 287, 289 (1952), cert. denied 344 U.S. 877. Agent Huntington testified that "she led the search".

In *Marshall* v. *United States,* 9 Cir., 352 F. 2d 1013, 1014 (1965), cert. denied 382 U.S. 1010, F.B.I. agents obtained the possession of a brief case of defendant left in the possession of his landlady for safekeeping. The court said, at 1015:

> "None of this, however, is meant to mean that a man's briefcase is never secure against unreasonable search and seizure, but when *possession and control of his briefcase is given by a man to another person we think that man accepts the risk that the other person will consent to a search and seizure of it and, under the circumstances that exist in this case, such consent is valid.* * * * (Emphasis supplied.)

While counsel for Garrett cites *United States* v. *Jeffers,* 342 U.S. 48 (1951), we hold that *Jeffers* is distinguishable because it involved the entry of a hotel room of the aunts of defendant therein by officers while the tenants were absent from the premises. In the case at bar a

private home was searched while the homeowner was present, gave permission and led the search.

3. Counsel for defendant William Earl Andrews, a son of Mrs. Mahon, in this court emphasizes that the government, in attempting to prove the identity of the robbers of the loan association, produced an employee thereof who saw two men leave after the robbery in a 1960 Thunderbird, which was identified as belonging to a sister of defendant Andrews.

The government evidence against Andrews was that he borrowed his sister's Thunderbird about 11:30 A.M. on the day of the robbery and returned it about 2:30 P.M. of the same day, that a similar car was seen outside the scene of the crime by a teller who ran out after the two robbers. The latter witness testified he saw only two men in the car and that one of them was defendant Simmons. Other eyewitnesses saw the second robber while inside the Association and later identified him as defendant Garrett.

We find there is on the record no sufficient evidence to justify conviction of defendant Andrews as an aider and abettor of the alleged robbery.

4. Defendant Simmons, testifying in his own behalf, denied that he was at the Association on February 27, 1964. Five Association employees who saw the men who conducted the holdup pointed out defendant Simmons in the courtroom. It is the contention of defense counsel that all of these witnesses, when identifying Simmons, were able to do so only because they had viewed certain snapshots of him which were in the hands of F.B.I. agents. It is further agreed that the snapshots were shown to the witnesses in such manner that Simmons dominated

those shown in the group of pictures viewed by these witnesses. However, these government witnesses underwent a cross-examination by defense counsel and we believed the record reveals that the weight to be given the identification testimony of the government witnesses was properly entrusted to the jury. Certainly we are not convinced, in view of the jury's verdict, that the record shows without question that the Association employees were improperly led to identify Simmons as one of the robbers by the showing of these snapshots to the government witnesses who identified Simmons.

Counsel for Simmons also contends that the Jencks Act required the prosecutor to tender to the defense "the pictures along with the statements".

As we said in *United States* v. *Sopher*, 362 F. 2d 523 (1966), cert. denied November 7, 1966, 35 LW 3162, 18 U.S.C.A. § 3500 (e) applies to a written statement made by a witness and signed or otherwise adopted or approved by him, or a recording or transcription thereof.

There is nothing in the Jencks Act which includes a photograph which is not a part of a statement as there defined. To the same effect is *Ahlstedt* v. *United States*, 5 Cir., 325 F. 2d 257, 259 (1963), cert. denied 377 U.S. 968.

5. A few remaining points raised in briefs of defendants we find lack merit.

As to defendant Andrews, the judgment from which he appealed is reversed.

As to the remaining defendants who have appealed, the judgments of the district court are affirmed.

AFFIRMED IN PART AND
REVERSED IN PART.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Wednesday, December 7, 1966

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. F. RYAN DUFFY, *Senior Circuit Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 15223, 24, 25

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ROBERT JAMES GARRETT, THOMAS EARL SIMMONS and WILLIAM EARL ANDREWS,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court as to defendant Andrews, in this cause appealed from be, and the same is hereby, reversed, and the judgments of the District Court as to the remaining defendants, Garrett and Simmons, be, and the same are hereby Affirmed, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Monday, January 23, 1967

BEFORE

Hon. JAMES S. HASTINGS, *Chief Judge*
Hon. F. RYAN DUFFY, *Senior Circuit Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 15223, 15224, 15225

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ROBERT JAMES GARRETT, et al,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for rehearing filed in this cause by the defendants-appellants herein be, and the same is hereby Denied.

No. ~~1057~~ 55

In the Supreme Court of the United States

OCTOBER TERM, 1966 67

THOMAS EARL SIMMONS AND
ROBERT JAMES GARRETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THURGOOD MARSHALL,
Solicitor General,
FRED M. VINSON, Jr.,
Assistant Attorney General,
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257-559—67

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1087

THOMAS EARL SIMMONS AND
ROBERT JAMES GARRETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 371 F. 2d 296.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1966. A petition for rehearing was denied on January 23, 1967. The petition for a writ of certiorari was filed on February 21, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether F.B.I. agents used improper investigative techniques when they asked robbery witnesses

on several occasions if they found pictures of the robbers among sets of photographs.

2. Whether the trial court was correct in ruling that the pictures shown to the eyewitnesses were not producible under 18 U.S.C. 3500.

3. Whether testimony of petitioner Garrett at a hearing on his motion to suppress evidence was properly admitted into evidence at trial.

STATUTE INVOLVED

18 U.S.C. 3500 provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *
>
> * * * * * *
>
> (e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners and William Earl Andrews were convicted of robbery of a federally insured savings and loan association, in violation of 18 U.S.C. 2113. On April 6, 1965, petitioners were sentenced to imprisonment for ten years, petitioner Garrett's term to commence upon completion of a sentence being served in the State of Tennessee. The court of appeals affirmed petitioners' convictions, but reversed as to Andrews.

The evidence showed that on February 27, 1964, at approximately 2:00 p.m., two men entered the Ben Franklin Savings and Loan Association in Chicago (Tr. 45, 135, 168, 274).[1] As they approached a teller window, another teller waved one of the men, later identified as Simmons, to her counter (Tr. 274). Simmons first requested a money order. Then he pointed a gun at the teller, and ordered her to put money in a blue cloth sack which he provided (Tr. 274). As the teller was filling the bag other employees of the bank began to realize that a robbery was taking place. Simmons, pointing his gun at a second teller, warned everyone to remain still and

[1] "Tr." refers to the two-volume "Transcript of Proceedings" filed with the Clerk of this Court.

avoid pressing the alarm buzzer, or he would shoot (Tr. 46, 136, 169). The teller who filled the bag gave it to the second man, later identified as Garrett (Tr. 277). The robbers then left the bank.

Shortly after the robbery, one of the tellers advised F.B.I. agents that the robbers had driven off in a white 1960 Thunderbird automobile (Tr. 49). The agents learned that a car fitting the description of the getaway vehicle belonged to the sister of William Earl Andrews (and sister-in-law of petitioner Simmons).

At trial, five prosecution witnesses, on direct examination, made positive identifications of petitioners in the courtroom, and some described their appearances at the time the offense was committed (Tr. 45, 47, 137–139, 169–170, 172, 275–277, 330, 333). On cross-examination it was shown that, late in the day of the robbery and the next day, F.B.I. agents had interviewed the five witnesses—the bank's comptroller and four tellers. Questioned individually, the employees were shown sets of pictures from which each identified one to three of Simmons (Tr. 77–79, 146–147, 251, 287–288, 356).[2] A few weeks later, and on other occasions, the agents returned to the bank and again placed a number of pictures[3] before the wit-

[2] On the afternoon of the robbery, F.B.I. agents visited the home of Mrs. Mahon, Andrews' mother. They obtained some snapshots of Simmons from another of Andrews' sisters (Tr. 508).

[3] The exact number of pictures shown to the witnesses apparently varied with each witness. One testified that she viewed "fifty or more" (Tr. 255). Another stated that she was shown 10 to 20 pictures, from which she identified Garrett as one of the robbers (Tr. 302–303). This witness also noted

nesses, requesting that they attempt to select those of the robbers. Prior to displaying the pictures, the agents did not reveal to the witnesses any information uncovered during the investigation of the robbery (Tr. 254, 290). Each time the witnesses positively identified Simmons as one of the robbers (Tr. 257, 302–303, 359–361). Two of the tellers and the bank's comptroller also identified pictures of Garrett (Tr. 259, 292–293, 303, 371).

During the investigation on the evening of the robbery, a house belonging to Mrs. Mahon, Andrews' mother, was searched with her consent. In the basement of the house F.B.I. agents found two suitcases. Mrs. Mahon denied any knowledge of the ownership of the suitcases and could not explain their presence in the basement (Tr. 229–230). She consented to having them opened and removed from the house. In one suitcase (Gov't Exh. 4) the agents found clothing, a gun holster, a blue sack, several coin cards and bill wrappers bearing the name of the victimized bank or numbers corresponding to account numbers of some of the bank's depositors, and a cigarette carton on which was stamped "Pulaski, Tennessee" (the home town of both petitioners) (Tr. 413–420). At trial it was shown that at a hearing on a motion by Garrett to suppress evidence pertaining to the suitcases and the contents of Government Exhibit 4,

---

that she was shown four or five pictures of Simmons and Garrett shortly before the trial (Tr. 295). The comptroller testified that a week and a half before trial government counsel showed her four pictures, of which one or two were of Simmons and none of Garrett (Tr. 361).

Garrett had identified the clothes found in that suitcase as his, although he could not definitely identify the suitcase itself (Tr. 182–183).

ARGUMENT

1. Petitioners' contention (Pet. 8–12) that the F.B.I. investigation was biased because the agents exhibited several pictures of them to the eyewitnesses on the day of the robbery and several times thereafter is without foundation. There is no evidence that the witnesses were coached or otherwise induced to choose pictures of Simmons or Garrett from the selection of photographs shown them. It is hardly surprising that the eyewitnesses would be able to identify pictures of the robbers a short time after the crime had been committed, especially in light of the fact that they had made no attempt to mask their identities.

Petitioners were not identified by their pictures alone; the witnesses also gave the agents descriptions of their physical characteristics and their manner of speaking. The witnesses correctly identified petitioners at trial even though they daily changed positions in the courtroom with their co-defendant Andrews (who was never identified by any of the robbery eyewitnesses), and on one occasion Andrews and Simmons wore similarly colored suits (Tr. 563). All of these circumstances clearly distinguish this situation from *Palmer* v. *Peyton*, 359 F. 2d 199 (C.A. 4), relied upon by petitioners (Pet. 10), where there was never a visual identification of the defendant, either in open court or by means of a lineup or

photographs, and where the complaining witness identified the defendant solely by describing the shirt which he owned as similar to one worn by her assailant, and by hearing his voice alone from another room.

2. On cross-examination of the four tellers and the bank's comptroller, defense counsel elicited testimony that each had given statements to the F.B.I. and that each had identified one or both petitioners from photographs furnished by the agents. After each witness so testified, petitioners moved for production of the statements under 18 U.S.C. 3500. In addition, counsel requested that all of the photographs shown by the agents to the witnesses be produced. When the first such request was made, government counsel expressed willingness to attempt to locate the pictures from the F.B.I. and turn them over to the defense counsel. However, the trial judge, after reviewing the witness' written statement, concluded that the photographs were not an integral part thereof and that the government was not required to produce the photographs. Accordingly, he decided not to delay the trial until the pictures were obtained, and ordered defense counsel to continue his cross-examination. After eliciting testimony from subsequent witnesses that they, too, had viewed pictures, defense counsel moved under 18 U.S.C. 3500 for their production. Each time his motion was denied.

The term "statement" is defined in 18 U.S.C. 3500 as (1) a written statement signed or otherwise adopted or approved by the witness; or (2) a substantially verbatim recital of an oral communication of the wit-

ness recorded contemporaneously with the making of the oral statement (see *supra*, pp. 2–3). Photographs do not fall within either of these definitions, and thus are not producible. *Palermo* v. *United States*, 360 U.S. 343. See also *Ahlstedt* v. *United States*, 325 F. 2d 257 (C.A. 5), certiorari denied, 377 U.S. 968. Apart from the fact that photographs are not writings, they do not originate with the witness and are not ordinarily his communications. While in some situations a photograph might be so interrelated to a statement as to make it producible in order to make the statement understandable, the trial court specifically found that no such situation was involved here.

In presenting its case, the government relied upon the courtroom identification and did not bring out the fact that the witnesses had earlier identified photographs of petitioners. The jury first learned about the photographs on cross-examination of these witnesses. Defense counsel, who had been given copies of the written statements of the witnesses, conducted lengthy examinations of these individuals. In these circumstances, not only was the court justified in ruling that the photographs did not fall within 18 U.S.C. 3500; it also appears that petitioners can show no prejudice from the absence of the photographs.

3. Petitioner Garrett had no interest in the house which was searched and was not present when the search was conducted. He had no permission from the owner to leave articles there, and she did not identify the suitcase admitted in evidence as Garrett's

(Gov't Exh. 4).[4] Nevertheless, he moved to suppress the evidence as to the suitcase and articles found therein, claiming that the clothes contained in one of the suitcases belonged to him. He now asserts that, since he had to make some claim of ownership in order to have standing to move to suppress, it was error to admit in evidence against him the testimony, including the admission of ownership of the clothes, which he voluntarily made at the hearing on the motion to suppress. It has, however, long been held that testimony voluntarily given in support of an unsuccessful motion to suppress may be offered against the movant as an admission against interest. *United States* v. *Taylor,* 326 F. 2d 277 (C.A. 4), certiorari denied, 377 U.S. 931; *Monroe* v. *United States,* 320 F. 2d 277 (C.A. 5), certiorari denied, 375 U.S. 991; *Fowler* v. *United States,* 239 F. 2d 93 (C.A. 10); *Kaiser* v. *United States,* 60 F. 2d 410 (C.A. 8), certiorari denied, 287 U.S. 654; *Heller* v. *United States,* 57 F. 2d 627 (C.A. 7), certiorari denied, 286 U.S. 567; *Connolly* v. *Medulie,* 58 F. 2d 629, 630 (C.A. 2). See *Jones* v. *United States,* 362 U.S. 257, 262. Any defendant who takes the stand for any purpose is to a greater or lesser extent on the horns of a dilemma since anything he says may, in the instant proceeding or in another context, be used against him. The dilemma presented by testifying in support of a motion to suppress has, for the most part, evaporated by reason of this Court's decision in *Jones* v. *United States,*

[4] The trial judge advised the jury that the evidence pertaining to Government Exhibit 4 was admissible only as to Garrett (Tr. 400).

362 U.S. 257. There the Court held that anyone legitimately on premises where a search occurs and anyone charged with a possessory crime has, without further showing, standing to contest a search (362 U.S. at 263–267). Thus, only in a case such as this, where, on the surface, no interest of person or property appears to have been involved, would it be necessary for the movant affirmatively to allege an interest in the property taken. In that situation, where a defendant not charged with possession of property can show no interest in the premises searched, it seems reasonable that one who wishes, for his own purposes, to assert an interest in property taken should be held to the normal consequences of his voluntary statements, *i.e.*, that they are admissible in evidence against him.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
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APRIL 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

No. 55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THOMAS EARL SIMMONS and ROBERT JAMES GARRETT,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 55

THOMAS EARL SIMMONS and ROBERT JAMES GARRETT,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

A. REFERENCE TO REPORTS.

The opinion of the Court of Appeals is reported at 371 F. 2d 296.

B. JURISDICTION.

The jurisdiction of this court is invoked under Title 28, U.S.C. Section 1254 (1). The judgment of the Court of

Appeals was entered on December 7, 1966. A petition for rehearing was timely filed and there denied on January 23, 1967. The petition for writ of certiorari was filed in this court on February 21, 1967 and certiorari was granted on June 12, 1967.

C. STATUTES AND AMENDMENTS TO THE UNITED STATES CONSTITUTION INVOLVED.

Title 18, U.S. Code, Section 2113 provides in relevant part:

> "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management or possession of, any bank, or any savings and loan association"
>
> "Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

AMENDMENT IV TO UNITED STATES CONSTITUTION:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V TO UNITED STATES CONSTITUTION:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

QUESTIONS PRESENTED:

1. Was Petitioner, Simmons' pre-trial identification so unnecessarily suggestive and conducive to irreparable mistaken identification, that he was denied due process of Law?
2. Did the Trial Court err in refusing a defense request under Section 3500 of Title 18, United States Code, for pictures used in obtaining pre-trial statements from Government witnesses subsequently incorporated by reference into the witnesses' written statements where identity was the vital issue of the trial?
3. Should a defendant who testifies to enforce his constitutional rights as guaranteed by the Fourth Amendment be required to sacrifice his rights under the Fifth Amendment?

STATEMENT OF THE CASE.

A. Nature of the Case and its Disposition:

Following a jury trial held in the District Court for the Northern District of Illinois, petitioners and William Andrews were convicted on an indictment charging them with taking a sum of money from a federally insured savings and loan association in violation of Section 2113, Title 18 of the United States Code (Count I); (b) with putting the lives of the employees of the same savings and loan association in jeopardy by the use of dangerous weapons in violation of Section 2113, Title 18 of the United States Code (Count II) (R 1-2).

Upon the return of the verdict of guilty, petitioners were sentenced to the custody of the Attorney General for imprisonment for a period of 10 years. The conviction of the petitioners was affirmed by the Court of Appeals for the Seventh Circuit, 371 F.2d 296, and the conviction of the defendant, Andrews, was reversed without remand. This Court granted a Petition for Certiorari, which Petition questioned the investigative technique of the Federal Agents which focused the attention of identification witnesses on one particular suspect; the trial court's refusal of the defense's request under Section 3500 of Title 18, United States Code, for pictures used in obtaining pre-trial statements from Government witnesses; and the court's requiring a defendant to sacrifice his rights under the Fifth Amendment in order to enforce his constitutional rights as guaranteed by the Fourth Amendment.

B. The Evidence:

On February 27, 1964, at about 1:45 P.M., two men, later identified as Simmons and Garrett, entered the Ben Franklin Savings and Loan Association, 4812 South Pulaski

Road, Chicago, and asked for a money order (R. 6). One of the men then thrust a gun through one of the teller windows, handing the teller a bag and demanding that she "sack it or stack it." (R. 29). The teller filled the bag with some $1,500.00 and the two men fled. The two men were in the bank about five minutes (R. 31). Mr. Mazaika, an employee of the savings and loan followed the men outside into the street and saw them drive away in a white 1960 Thunderbird. (R. 7). Mr. Mazaika said the car had a big scrape along the passenger side of the door. (R. 7). The police immediately searched the area to locate the described automobile. (R. 14). At about 2:30 P.M., this search led to a Thunderbird owned by Mary Ruth Rey, a sister of the defendant, Andrews. (R. 14). Andrews had borrowed the car from his sister on the day of the robbery at about 11:30 A.M. to drive to Indiana. He returned it at 2:30 P.M. according to Helen Scapardine who was using the car while Mrs. Rey was in the hospital (R. 47-49).

The next day the F.B.I. obtained from Patricia Schuster, another sister of Andrews, several snapshots of Simmons and Andrews. Patricia Schuster is also Simmons' sister-in-law. (R. 39).

On this same day, or shortly thereafter, each savings and loan employee viewed these snapshots. Prior to the viewing of the snapshots, the employees had discussed with each other what they had seen at the time of the robbery. The snapshots were shown to the employees one after another at the savings and loan. Five of the employees who identified Simmons revealed that the FBI had shown them a group of five or six snapshots of which several were photos of Thomas Simmons.

Phillip Mazaika said he saw five or six snapshots of which two were photos of Simmons. (R. 51, 53). Florence Babick said she saw three pictures of Simmons. (R. 56).

Mary Bialek, who viewed pictures several times before the trial, said she saw several pictures of Simmons. (R. 67). Bernice Parliaman remembered that she saw three or four pictures of Simmons among the seven she viewed (R. 75-76). And, Bernadine Dziedzic saw two or three pictures of Simmons among the six pictures she viewed after the robbery. (R. 32).

The prosecutor shortly before the trial, visited the witnesses and again showed them pictures. (R. 75, 80). Mary Bialek testified that she viewed pictures of Simmons the day before she testified and identified him in Court. (R. 25). Bernice Parliaman said she viewed six pictures, all of them either of Simmons or of Andrews, when she was served with a subpoena to testify. (R. 75). Bernadine Dziedzic also viewed pictures of Simmons a week and a half before the trial when the Assistant United States Attorney visited her at the savings and loan with four pictures. (R. 32).

On the day of the trial, prior to testifying, the witnesses, in the company of the Agents of the FBI and other witnesses, saw the petitioners in the courtroom. (R. 8, 18, 25).

None of the witnesses were asked by the police or the F.B.I. to view a lineup of possible suspects. (R. 9).

Phillip Mazaika told the F.B.I. agents on the day of the robbery, and later testified that the man he had identified as Thomas Simmons had a Tennessee accent when he spoke in the savings and loan association. (R. 11, 51-52). Prior to that, the F.B.I. knew that Simmons was living in Pulaski, Tennessee. (R. 36, 45).

At approximately three o'clock in the afternoon of February 27, 1964, six men with drawn guns forced their way into the home of Mrs. Mahon, the mother of the defendant,

Andrews. After ransacking the house without permission, they suddenly left, taking nothing. (R. 23, 59-60). Then, at about 6:30 P.M. agents Huntington and Quinlan of the F.B.I. arrived at Mrs. Mahon's house, without a warrant (R. 60) and went directly to the basement where they found two suitcases in which money wrappers and other incriminating evidence were found. Mrs. Mahon stated that she gave no permission and asked them not to take anything (R. 60). Agent Huntington said that they had consent, and that they were escorted to the basement where the suitcases were found (R. 23). At trial, the Petitioner Garrett moved to suppress the suitcases as evidence, and took the stand in his own behalf to testify that one of the suitcases was his (R. 20). The suitcase had been left at the home of Mrs. Mahon on the morning of February 27, 1964, and Garrett at no time consented to its removal from the premises of his friend's mother (R. 20).

During the trial, Mr. Betts, the Court Reporter, was called by the Government and read to the jury the transcript he had made of the testimony of the Petitioner Garrett during the hearing on suppression of the evidence seized without a warrant (R. 33-35.) This was done over the objection of counsel for the petitioners (R. 33).

Petitioner Simmons swore that he was not in the savings and loan on February 27, 1964. He said that he arrived in Chicago that day along with Garrett and Andrews and went to the home of Pat Schuster his sister-in-law. After visiting with Pat Schuster for about an hour, Simmons went with the other two men to a tavern for a beer. Andrews left the two others to pick up the borrowed car. When the three left the tavern, Simmons went alone to a drive-in for a sandwich. He then went to another tavern for about an hour and then walked back to Pat Schuster's house to pick up his suitcase, arriving there about 2:30 p.m.

Simmons further testified that Andrews and Garrett, who had planned to use the borrowed car for a trip to Indiana, arrived back at Pat Schuster's house at about 2:45 P.M. Joe Franz, proprietor of a newspaper circulation office located nearby, then came and told Simmons that the police were looking for him. Franz, who was questioned by the F.B.I. for six hours but never charged with anything (R. 15) arranged transportation for Simmons to Indiana. Simmons boarded a bus in Indiana for Tennessee (R. 40-42.)

SUMMARY OF ARGUMENT.

I.

The Federal Bureau of Investigation agents focused the identification witnesses' attention to petitioner Simmons as the robber. The agents obtained snapshots of Simmons and the defendant, Garrett and showed only five or six pictures to the witnesses the day after the robbery. Simmons was depicted in two or three of these snapshots. The agents allowed mass psychology to be an important factor in the identification by arranging to have the witnesses together at the savings and loan at the time the pictures were viewed. Prior to the identification the witnesses had discussed the robbery with each other to such an extent that they made statements to the Federal Bureau of Investigation concerning occurrences that they had not actually seen. Affirmative indications of suggestion were evident when a witness testified that Simmons had a Tennessee accent. The Federal Bureau of Investigation knew that Simmons was living in Pulaski, Tennessee. Thus, the pre-trial identification of Simmons was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.

II.

Simmons' counsel's request under Section 3500 of Title 18, United States Code, for pictures used in obtaining the pre-trial statements of Government witnesses was denied. Identity was the vital issue of the trial and without these pictures counsel was unable to clearly reconstruct the manner in which Simmons was identified as the robber. Since the photographs were of a limited number, were relevant to the case on trial and were referred to in the witnesses 3500 statements, the trial court erred in refusing to allow the Government's tender of the photographs.

III.

Petitioner, Garrett in enforcing his rights against unreasonable search and seizure, was obliged to take the witness stand and assert ownership in evidence seized by the Federal Bureau of Investigation agents without a warrant. Over the objection of the petitioners, his testimony in support of the motion to suppress was introduced in the government's case in chief. The trial court's rulings forced Garrett to barter away his rights against self-incrimination in return for the opportunity to assert his Fourth Amendment rights.

ARGUMENT

I.

PETITIONER, SIMMONS' PRE-TRIAL IDENTIFICATION WAS SO UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO IRREPARABLE MISTAKEN IDENTIFICATION THAT HE WAS DENIED DUE PROCESS OF LAW.

The bank robbery investigative squad of the Federal Bureau of Investigation is the elite of the nation's finest police agency. If these agents are permitted to employ the techniques that deprived petitioner, Simmons, of the standards of fairness required by due process, the less experienced and less thoroughly trained local law enforcement officers can hardly be expected to safeguard a suspect's constitutional rights.

The most important safeguard against an improper conviction of a citizen, is an unbiased impartial police investigation. Police technique must meet with the requirements of decency and fairness established as the fundamental law of the land.

The question here is whether Simmons' pre-trial identification "was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law" guaranteed him by the Fifth Amendment. *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Palmer* v. *Peyton*, 359 F.2d 199 (C.A. 4th Cir. 1966).

The totality of circumstances of the Simmons' pre-trial identification encompass all the dangerous factors which contribute to the illicit identification evidence con-

demned in *United States* v. *Wade,* 388 U.S. 218 (1967); *Gilbert* v. *California,* 388 U.S. 263 (1967) and *Stovall* v. *Denno,* 388 U.S. 293 (1967).

As in *Stovall,* the petitioner, Simmons, was identified in what amounted to a one man lineup. On the day after the robbery, the F.B.I. agents obtained snapshots of the petitioner, Simmons, and the defendant, Andrews. On that same day at the savings and loan association, these snapshots were exhibited to the employees. Five of the employees who identified Simmons revealed that they began focusing on Simmons when the agents showed them a group of five or six snapshots of which several were photos of Thomas Simmons. From the time of the robbery to the trial, the memory of the identifying witnesses was further prodded when the prosecutor and F.B.I. agents visited the witnesses and again exhibited these snapshots. Simmons continued to dominate the small group of pictures seen by the witnesses. The last viewing of the pictures occurred the day before trial. A witness testified that the stated purpose of these additional visits was "to be sure we identified the right person". (R. 69). On the day of trial, several of the witnesses accompanied by F.B.I. agents saw two of the defendants in the courtroom.

The likelihood of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pre-trial identification, was demonstrated in *United States* v. *Wade,* 388 U.S. 218 (1967) and *Gilbert* v. *California,* 388 U.S. 263 (1967).

The circumstances of the petitioner, Simmons' case shows the highest degree of opportunity for suggestion. When the witnesses examined the petitioner's snapshots, they were all present at the same time at the savings and loan association. Though the tellers testified that when

they looked at the pictures the other tellers were not in their immediate presence, the danger of mass psychology was apparent. See *Gilbert* v. *California,* 388 U.S. 263 (1967).

Prior to this viewing, they had discussed the facts of the robbery with each other. One teller, Mr. Mazaika, informed the F.B.I. of an occurrence that he had not even seen (R. 12). Mr. Mazaika also told the agents that the man he had identified as Simmons, spoke with a Tennessee accent. At the time he made that statement, the agents were aware that Simmons had been living in Pulaski, Tennessee. The robber identified as Simmons, spoke very little and the only reason that Mazaika gave for the Tennessee accent, was that the robber spoke slower than other southerners.

The witnesses "opportunity for observation was unsubstantial" here since the robbers were only in the savings and loan association about five minutes. The obvious excitement caused by the robbery added to the difficulty of identification. Since the crime here was robbery in which deadly weapons were used, there is present the particular hazard that the "victims understandable outrage may excite revengeful or spiteful motives." *United States* v. *Wade,* 388 U.S. 218 (1967).

It is clear that the totality of circumstances of the petitioner's pre-trial identification conclusively demonstrate that the identification was "unnecessarily suggestive and conducive to irreparable mistaken identification that the petitioner was denied due process of law. *Stovall* v. *Denno,* 388 U.S. 293 (1967).

The necessity of immediate identification that was imperative in *Stovall* was not required in Simmons' case.

The numerous employees of the savings and loan association were available at any time. After obtaining the pictures of the petitioner, Simmons, the federal agents could have readily obtained other pictures that would have made a meaningful lineup identification possible.

Since this is a federal case involving unfair activity on the part of federal agents and prosecutor, this Court should also reverse this case based on its supervisory powers. (cf: *McNabb* v. *United States,* 318 U.S. 332; *Mallory* v. *United States,* 354 U.S. 449; *Elkins* v. *United States,* 364 U.S. 206.

II.

THE TRIAL COURT ERRED IN REFUSING A DEFENSE REQUEST UNDER SECTION 3500 OF TITLE 18, UNITED STATES CODE FOR PICTURES USED IN OBTAINING PRE-TRIAL STATEMENTS FROM GOVERNMENT WITNESSES SUBSEQUENTLY INCORPORATED BY REFERENCE INTO THE WITNESSES' WRITTEN STATEMENTS WHERE IDENTITY WAS THE VITAL ISSUE OF THE TRIAL.

The decision of this Court in *Dennis* v. *United States,* 384 U.S. 855, 870 (1966) in allowing the defense to obtain grand jury testimony of a witness states that "disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."

The purpose of Title 18, Section 3500 of the United States Code is to further fair and just administration of criminal justice. *Campbell* v. *United States,* 373 U.S. 487 (1963). A defendant is given the opportunity to completely develope the underlying foundation for a witness' testimony on direct examination through the use of a prior statement. A jury is able to determine how much weight is to be given a particular witness.

Since the identity of the robbers was the primary issue of the trial, a full disclosure of the manner in which Simmons was identified was vital. There is no question that photographs were used by F.B.I. agents to obtain statements from the witnesses. It is also certain that the witnesses incorporated the pictures by reference in their statements (R. 68). Therefore, counsel for the petitioner Simmons requested the photographs pursuant to Title 18, Section 3500 United States Code. The trial court denied this request (R. 54, 56-57).

The statements of the various witnesses varied on the number of pictures they saw of the petitioners. There was an even greater variance on the total number of pictures exhibited to the witnesses. In fact, it is not even clear that some witnesses viewed pictures of anyone other than a defendant.

From the prosecutor's own statements and the limited cross examination of the witnesses identifying petitioner, Simmons, there must have been grave doubt in the minds both of the trial judge and the jurors on the procedures used to identify Simmons. The prosecutor said there was a "multitude" of pictures involved in the procedure (R. 54). One witness said she saw fifty (R. 69). But all four other witnesses said they saw only about five or six. Obviously the production of the pictures by the prosecution would have greatly aided the defense cross examination of the witnesses to establish for the court and jury exactly what led to the identification of Simmons.

Although the prosecutor indicated he was willing to make available to the defense the group of pictures used by government agents as they focused witnesses' attention on defendants (R. 54), the trial court decided *sua sponte* that the defense would not be permitted to use the group

of pictures in cross examination of the identifying witnesses (R. 54). As a result, the defense was denied access to evidence in the possession of the government.

This court in *United States* v. *Wade,* 388 U.S. 218 (1967) pointed out the difficulties inherent in the reconstruction of a pre-trial lineup by a defense counsel. Simmons' counsel was further handicapped by the fact that pictures were used for the identification. Therefore, even the defendant was not present at the identification and could not in any way, assist his counsel.

Since the photographs were of a limited number, all were relevant to the case on trial, all were referred to in the witnesses' 3500 statements and all were available to be produced by the prosecutor, the trial court erred in refusing to allow the Government's tender of the photographs.

III.

A DEFENDANT WHO TESTIFIES TO ENFORCE HIS CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FOURTH AMENDMENT SHOULD NOT BE REQUIRED TO SACRIFICE HIS RIGHTS UNDER THE FIFTH AMENDMENT.

To protect his Fourth Amendment rights against unreasonable search and seizure, Garrett was obliged to take the stand and assert ownership in one of the suitcases seized by the F.B.I. agents without a warrant. In order that the Petitioner Garrett have the proper standing to make the objection, it was essential that he so testify. Over the objection of the petitioners, Garrett and Simmons, however, the trial court allowed the transcript of Garrett's testimony in support of his motion to be read to the jury, and thus the fatal link identifying him with the suitcase

and its contents was established. To thus force the defendant Garrett to barter away his rights against self-incrimination in return for the opportunity to assert his Fourth Amendment rights is a violation not only of the right against self-incrimination, but of the right to due process itself.

The identification of the defendant Garrett with the suitcase containing the money wrappers and the other incriminating evidence must have made a vivid impression on the jury. If this evidence was improperly admitted, there exists far more than the "reasonable possibility" that the evidence contributed to the conviction which is necessary for reversal. *Fahy* v. *Connecticut,* 375 U.S. 85, 86-87 (1963).

In *Safarik* v. *United States,* 62 F2d 892 (8th Cir. 1933) the defendants made a motion to suppress and in support of that motion filed affidavits admitting the ownership of the seized evidence. The motion to suppress was granted in part and denied in part. The Government introduced at the trial both the motion to suppress and the supporting affidavits. The 8th Circuit held that the affidavits were not admissible at the trial and stated that "the documents were tantamount to a written confession of guilt" and that the admission would make "a rule of evidence and not the Constitution of the United States, the supreme law of the land. To hold so, would render the constitutional guarantees sonorous but impotent phrases."

In *Heller* v. *United States,* 57 F. 2d 627 (7th Cir. 1932) a conviction was affirmed in these words:

> "Having voluntarily become a witness upon one issue in the case, what he there testified may thereafter be shown against him upon trial of any other issue therein." 57 F 2d 627 at 629.

In a strong and cogent dissent, however, Judge Evans points out that it was necessary for the appellant to make application for the return of the allegedly unlawfully seized property in order to protect himself against the use of such evidence. Judge Evans concludes:

> "The evidence thus given to support such petition is received for no other reason than to protect a constitutional right granted the accused by the Fourth Amendment. If such testimony can only come from the lips of the accused, then his testimony, as well as his petition, should not be used against him." F. 2d 627 at 630.

A recent decision which is pertinent is *Cristensen* v. *United States,* 259 F. 2d 192 (D.C. Cir., 1958). While the majority affirms convictions in a four-paragraph opinion on the grounds of sufficiency of evidence, Judge Bazelon, dissenting focuses on the exact issue of the present case in a well-reasoned nine-page opinion. It would be presumptive in the brief to attempt to improve upon the scholarly analysis of Judge Bazelon of the law of searches and seizures as applied to the very issue here on appeal. Let it suffice to say that Judge Bazelon, with reference to Judge Evan's dissent in *Heller supra,* points out that no distinction is made between situations where the motion to suppress has been overruled and those where it has been sustained. To summarize, Judge Bazelon states the problem thusly:

> "We place the victim of the search upon the horns of a dilemma. If he does not claim possession of the seized contraband, we allow it to be used in evidence against him. If he does claim possession of the contraband, we let his own claim convict him.
>
> "To be sure, the Fourth Amendment right to be free from unreasonable search and seizure is a right that may be waived. So also is the Fifth Amendment right

> not to be compelled to incriminate one's self. But a rule which compels the defendant to forego one of his two constitutional rights as a condition to exercise of the other is, in my opinion, invalid." 259 F. 2d 192 at 197 (Citations omitted, emphasis in original).

The problem cannot be answered by arguing that the Fourth and Fifth Amendments stand apart from each other. This argument was put to rest in *Davis* v. *United States,* 328 U.S. 582 (1946) wherein Justice Frankfurter said:

> "The law of searches and seizures as revealed in the decision of this Court is the product of the interplay of these two constitutional provisions. *Boyd* v. *United States,* 116 U.S. 616. It reflects a dual purpose protection of the privacy of the individual, his right to be let alone, protection of the individual against compulsory production of evidence to be used against him." 329 U.S. 582 at 587.

In the present case, the petitioner Garrett was forced to barter his constitutional protection against an unlawful search and seizure as the price of his good faith effort to exclude the evidence the Government had obtained by a warrantless search. He had no choice; he was forced to take a desperate chance in order to secure the exclusion of the evidence. Failing in his proof, he has been forced to pay an unconscionable price. The identification of the suitcase and its contents was tantamount to an admission of guilt.

United States Ex Rel. Hetenyi v. *Wilkins,* 348 F.2d 844 (2nd Cir. 1965) in a notably careful and well-reasoned opinion, Judge Thurgood Marshall examines the fairness of placing a criminal defendant on the horns of such a dilemma, and finds it contrary to the guarantees afforded by the Constitution. The opinion roundly condemns the

"barter theory of fairness",[1] stating that the Government's argument that the defendant somehow "agreed" to subject himself to re-prosecution if the convictions on the lesser charge were reversed would be "to ignore the elementary psychological realities of the situation." 348 F. 2d 844 at 859. In reply to the Government's arguments based on cases decided near the turn of the century, Judge Marshall outlined the immense strides that have been made in expanding the constitutional protections of the accused in the last few decades. Judge Marshall concluded:

> "(W)e would decline to follow them in applying the fundamental fairness standard, not merely because of their half century antiquity, but because we would not be faithful to the evolution of our social values if we reached any other conclusion." 348 F. 2d 844 at 863.

The Court of Appeals' decision here attempted to dispose of petitioners contention by stating:

> "Moreover, the choice of a solution for a dilemma (if we assume that one existed) was for Garrett's attorney, and he made a decision . . . Faced with an indictment charging him with a criminal offense, defendant Garrett was entitled to, and had, a trial by jury . . . The testimony was voluntary and given under the guidance of his own counsel. To hold otherwise, we would in effect be attempting to create a 'judicial amendment' to the constitution to protect persons from the risks of errors of judgment in trial tactics." (Appendix A, p. 4).

The court in so holding, is placing a burden and a risk on only one party to the lawsuit. The Government has the burden of proving its case. Looking at the case from this

---

[1] See also:

point of view, the trial court should have required the United States to prove its case independently of a windfall at the time of trial. If the petitioner Garrett had testified in the defendant's case in chief, obviously this would be a matter of trial tactics and any information obtained from him on cross examination would be binding against him. However, when the defendant Garrett attempted to avail himself of the constitutional safeguard against unlawful search and seizure, his action was not a matter of trial tactics. *United States* v. *Blalock*, 253 F. Supp. 860 (E.D. Pa. May 13, 1966); *People* v. *DeFilippis*, 34 Ill. 2d 129, 214 N.E. 2nd 897 (March 23, 1966).

Therefore, the trial court erred in permitting the testimony of the petitioner Garrett in support of his motion to suppress the evidence to be read to the jury as part of the government's case in chief.

CONCLUSION

For the reasons herein expressed, petitioners pray that their conviction be reversed.

Respectfully submitted,

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No. 55

In the Supreme Court of the United States

OCTOBER TERM, 1967

THOMAS EARL SIMMONS AND ROBERT JAMES GARRETT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 55

THOMAS EARL SIMMONS AND ROBERT JAMES GARRETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 82–87) is reported at 371 F. 2d 296.

JURISDICTION

The judgment of the court of appeals (R. 88) was entered on December 7, 1966. A petition for rehearing (R. 89) was denied on January 23, 1967. The petition for a writ of certiorari was filed on February 21, 1967, and was granted on June 12, 1967 (R. 90; 388 U.S. 906). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 3500 provides in pertinent part:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *

* * * * *

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

QUESTIONS PRESENTED

1. Whether petitioners' constitutional rights were violated by F.B.I. agents' asking robbery eyewitnesses on several occasions if they found pictures of the robbers among sets of photographs.

2. Whether the trial court erred in failing to direct the production under 18 U.S.C. 3500 of pictures shown to the eyewitnesses.

3. Whether testimony of petitioner Garrett at a hearing on his motion to suppress evidence was properly admitted into evidence at trial.

STATEMENT

Petitioners and William Earl Andrews were convicted after a trial by jury in the United States District Court for the Northern District of Illinois of two counts charging robbery of a federally insured savings and loan association, in violation of 18 U.S.C. 2113. On April 6, 1965, petitioners were sentenced to imprisonment for ten years, petitioner Garrett's term to commence upon completion of a State court sentence being served in Tennessee. The court of appeals affirmed petitioners' convictions, but reversed as to Andrews.

The evidence showed that on February 27, 1964, at approximately 2:00 p.m., two men entered the Ben Franklin Savings and Loan Association in Chicago. One, later identified as Simmons, approached the window where Bernice Parliaman, a teller, was situated, and indicated a desire to purchase a money order. He then pointed a gun at the teller, handed her a blue sack, and ordered her to "stack it" (R. 29).

As Mrs. Parliaman filled the bag, three other tellers became aware that a robbery was taking place. Simmons moved to the window of one of them, Florence Babick, pointed his gun at her, and ordered her to "[s]tay right there or I will shoot you" (R. 16). He cautioned the other bank employees to remain still and to avoid pressing the alarm buzzer, or he would shoot. The second robber, later identified as Garrett, moved to Mrs. Parliaman's window and held his gun on her while she continued to fill the blue sack (R. 27). She emptied her teller's drawer of cash, rolled coin, and coin wrappers, all of which were placed in the cloth bag, which was handed to Garrett (R. 27–28). The robbers then left the bank. After waiting a few moments, a teller, Phillip Mazaika, rushed into the street in time to see Simmons sitting on the passenger side of a white 1960 two-door Thunderbird automobile as it drove away. Mazaika noticed that the car bore a large scrape on the right door, and was quite dirty (R. 7).

Shorty after the robbery, the tellers and another bank employee who had witnessed the robbery were interviewed by F.B.I. agents. A car fitting the description of the getaway vehicle was located and found to be the property of Mrs. Rey, the sister of William Earl Andrews and sister-in-law of petitioner Simmons. She had loaned it to Andrews that afternoon for a short while (R. 3, 4).

Early the same evening, two F.B.I. agents proceeded to the home of Mrs. Mary Mahon, Andrews' mother. The house was situated a half-block from the place where the Thunderbird had been parked (R. 23). After explaining their purpose, the agents re-

quested a photograph of Andrews. Mrs. Mahon replied that she had none (R. 64). She consented to and led the agents in a search of her house. In the basement two suitcases were found. Mrs. Mahon denied any knowledge of the ownership of the suitcases, and could not explain their presence in the basement. She consented to having them opened and removed from the house (R. 64–65). In one suitcase (Gov't Exh. 4) the agents found clothing, a gun holster, a blue sack, several coin cards and bill wrappers bearing the name of the victimized bank or numbers corresponding to account numbers of some of the bank's depositors, and a cigarette carton, on which was stamped "Pulaski, Tennessee" (the home town of both petitioners and Andrews). At trial it was shown that, at a hearing on Garrett's motion to suppress evidence pertaining to the suitcase and its contents, Garrett had identified the clothes found as his, although he could not positively identify the suitcase itself (R. 20, 33–35, 58).

The following morning F.B.I. agents spoke to another of Andrews' sisters, Pat Jones, who lived with Mrs. Mahon. She produced a scrapbook, and removed from it several photographs, which were given to the agents (R. 81). Later that day, the agents returned to the bank. The witnesses to the robbery were called individually to a desk in the lobby of the bank and asked to view a number of photographs. Each identified two or three pictures of Simmons as representing one of the robbers (R. 53, 56, 67, 73, 78). About a week later two of the tellers and the comptroller also identified pictures of Garrett (R. 33, 70–

71, 76).[1] The other tellers indicated that their view of Garrett during the robbery had been obstructed by partitions in the building (R. 9, 17).

Petitioners' motion to suppress Government Exhibit 4—one of the suitcases—and its contents was denied by the district court, because there was insufficient evidence that the search and seizure were "in any way illegal" (R. 24). No opinion was written by the trial court.

Petitioners made essentially the same contentions in the court of appeals as they assert presently, and all were unanimously rejected by the Seventh Circuit. That court concluded that petitioners had not shown that the viewing of pictures by the eyewitnesses improperly led them to identify Simmons as one of the robbers (R. 87). The court noted that the "government witnesses underwent a cross-examination by defense counsel and * * * the record reveals that the weight to be given the identification testimony of the government witnesses was properly entrusted to the jury" (*ibid.*). Petitioners' claim that they were entitled to production of the photographs under 18 U.S.C. 3500 was likewise rejected, the court below stating that: "[t]here is nothing in the Jencks Act which includes a photograph which is not a part of a statement as there defined" (R. 87). As to petitioners' contention that Garrett's Fifth Amendment rights were

[1] Since the number and kind of photographs shown to the witnesses, their reactions to the viewings, etc. are intimately related to the overall fairness of the pretrial identification procedure, a more complete discussion of these matters is included along with the argument on this point (see *infra*, pp. 16–20, 23–24).

violated by the introduction of his testimony in support of the motion to suppress, the court of appeals concluded that "counsel has shown no dilemma, because he has never shown that there was no other way for him to prove Garrett's ownership of the suitcase," and noted that "the fact of ownership of such an object as a suitcase might be proved in numerous ways * * *" (R. 84). "Even if there were no other evidence of ownership available," the court further stated, "Garrett voluntarily testified in support of his motion to suppress and he could not thereafter rely on the fifth amendment to bar consideration by the trier of facts of that testimony" (*ibid.*). Since Garrett's decision to testify in support of the motion to suppress was voluntary and his testimony was given under guidance of counsel, what he actually sought was protection from "the risks of errors of judgment in trial tactics," the court concluded (R. 85). Finally, the court of appeals stated that the search and seizure which produced the suitcase were not improper, since the evidence showed that they had been at least impliedly consented to by Mrs. Mahon, the owner of the house in the basement of which the suitcase was found (R. 85–86).[2]

SUMMARY OF ARGUMENT

I

A review of the "totality of the circumstances" surrounding the investigative techniques employed by the

[2] Pointing out that none of the eyewitnesses identified Andrews, the court of appeals found "no sufficient evidence to justify [his] conviction * * * as an aider and abettor of the alleged robbery" (R. 86), and reversed his conviction (R. 87, 88).

F.B.I. agents, as adduced by defense counsel, fails to support petitioners' contention that the eyewitnesses' identifications of petitioner Simmons were improperly induced. No lineup was used here; nor could any absence of counsel claim properly be made. The government relied solely upon the positive in-court identifications of Simmons by the eyewitnesses. The pictures used to obtain the earlier extrajudicial identifications were sufficient in number to ensure a fair and unbiased identification procedure. They were shown to the eyewitnesses in separate interviews; all but one (which was not identified as of Simmons) were the same size, and Simmons was not featured in such a manner as to attract the attention of the viewer and induce him to make an unreliable identification. At all events, imperfections in the investigative procedure, if any, would affect the weight, but not the admissibility, of the courtroom identifications. No denial of due process resulted from the identification procedure here involved.

II

In the circumstances of this case, the photographs shown to the eyewitnesses were not producible pursuant to 18 U.S.C. 3500. Congress did not intend that photographs, at least as a general rule, could be required to be produced under the Jencks Act. Both the text of the statute and its legislative history are quite clear on this point. Nor were the pictures sought here an integral part of any government witness's written statement. Thus, it remained for the trial court, in its discretion, to determine whether the pictures should be produced. In view of the delay which an order for

production would have caused, as well as the lengthy cross-examination conducted by defense counsel and the fact that the government witnesses' in-court identifications were unequivocal, the trial court did not abuse its discretion in declining to order production of the photographs shown to these witnesses.

III

Petitioner Garrett was not "compelled" to waive his privilege against self-incrimination in order to assert his rights under the Fourth Amendment. His voluntary decision to testify in support of his motion to suppress was a tactical choice, made upon advice of counsel and with knowledge that the suitcase in which his clothes were discovered was found in a house in which he had no interest, and whose owner, Mrs. Mahon, had never met or seen him. He knew, too, that the search was not directed toward him, and had at least implicitly been consented to by Mrs. Mahon. Yet, for his own purposes, Garrett sought to take advantage of what he claimed to be an illegal invasion of Mrs. Mahon's privacy by asserting that the clothes inside the suitcase were his. If his motion had succeeded, his testimony in support of his standing to object, as well as the suitcase and its contents, would probably have been inadmissible. Accordingly, Garrett stood to gain and assumed a known risk in seeking to suppress the suitcase, but nothing compelled him to do so. Thus, the testimony offered by Garrett in his unsuccessful attempt to have the suitcase excluded was properly admitted in evidence at trial,

if sufficiently independent of the earlier lineup identification.

Moreover, in *Stovall* the Court determined that the holding of *Wade* and *Gilbert* would not be applied retroactively. Thus, since petitioners were tried and convicted prior to June 12, 1967, no claim could be made that *Wade* and *Gilbert* applied even if a lineup identification had been involved. *A fortiori,* those decisions are inapplicable to earlier identifications not involving a lineup.[3]

Indeed, petitioners make no Sixth Amendment contention here. Rather, they apparently rely on the Due Process Clause, and ground that reliance on certain language in this Court's opinion in *Stovall.* There, independent of the issue regarding absence of counsel, a claim was made that a confrontation conducted at the hospital bed of the only living eyewitness was "so unnecessarily suggestive and conducive to irreparable mistaken identification" as seriously to impair the validity of the identification testimony at trial (388 U.S. at 302). Citing *Palmer* v. *Peyton,* 359 F. 2d 199 (C.A. 4), the Court noted that a complaint charging

[3] In view of the Court's repeated references in the *Wade* opinion to the compelled "confrontation" between the accused and witnesses at a lineup (*e.g.*, 388 U.S. at 226–230), it seems clear that extrajudicial identification procedures which do not involve such a confrontation are not controlled by the *Wade* and *Gilbert* decisions, insofar as the right to representation by counsel is concerned. Indeed, in discussing the factors to be considered in determining whether the taint of a lineup identification without counsel had been sufficiently purged to permit the introduction of identification testimony at trial, the Court in *Wade* approvingly referred to "the identification by picture of the defendant prior to the lineup * * *" (388 U.S. at 241).

an unduly suggestive extrajudicial confrontation procedure was "a recognized ground of attack upon a conviction independent of any right to counsel claim," and raises an issue of due process of law (*ibid.*). Resolution of a claimed due process violation "in the conduct of a confrontation," it was said, "depends on the totality of the circumstances surrounding it * * *" (*ibid.*). The Court then concluded that there was no violation of due process under the circumstances there presented.

In this case, no pretrial identification by viewing petitioners in person was ever made. Unlike *Stovall*, there was no "confrontation" between accused and witness; here the eyewitnesses testified that they did not see petitioners in person from the day of the robbery to the day of trial. Nevertheless, because the witnesses had given detailed descriptions of the robbers to the F.B.I.,[4] and had identified their pictures on several occasions—the first time as to Simmons on the day following the robbery—petitioners contend that the extrajudicial identification procedure used by the F.B.I. unduly focused the attention of the eyewitnesses upon Simmons,[5] and thereby inevitably resulted in their identification of him at trial as one of the robbers.[6] Accordingly, it seems appropriate to

[4] Statements containing these descriptions were produced at trial and turned over to defense counsel pursuant to 18 U.S.C. 3500.

[5] Petitioners do not urge that the allegation of unlawful pretrial identification extends to Garrett (see Pet. 8–10 and Pet. Br. 10–13).

[6] *Palmer* v. *Peyton*, 359 F. 2d 199 (C.A. 4), relied on by petitioners (Pet. Br. 10), involved a factual situation far differ-

review the "totality of the circumstances" surrounding the pretrial identification procedure.

1. THE OPPORTUNITY FOR OBSERVATION AT THE TIME OF THE ROBBERY

The bank robbery occurred in the early afternoon on a clear day in a well-lighted bank. The robbers were not masked and made no attempt whatever to disguise their appearance. The robber subsequently identified as Simmons [7] was seen at close range by five persons. These circumstances strongly suggest that the eyewitnesses were in a position to make a reliable, positive and unmistakable identification of Simmons.

2. EVENTS IMMEDIATELY FOLLOWING THE ROBBERY

The testimony of the F.B.I. agents makes it quite clear that at the beginning of their investigation the

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ent from that presented here. There the identification of the alleged assailant by the victim was based almost solely on her hearing of his voice; no confrontation or actual viewing occurred, no lineup was conducted, and the victim was not even given the opportunity to hear other voices (see *id.* at 200–202). It can hardly be cogently maintained that the finding of a denial of due process in such circumstances supports such a conclusion here.

[7] In support of their claim that the F.B.I. agents influenced the witnesses to identify Simmons, petitioners cite a purported statement by the witness Mazaika that the robber he identified as Simmons spoke with a "Tennessee accent" (Pet. Br. 12). The evidence shows, however, that Mazaika described Simmons as having a "southern accent" (R. 6). On cross-examination, when the witness was asked whether he could identify a Tennessee accent, government counsel interposed an objection, noting that Mazaika did not describe Simmons as having a "Tennessee accent" (R. 9–10). Another eyewitness, Mrs. Parliaman, testified at trial that the robber she identified as Simmons had a pronounced southern accent (Tr. 316).

prime suspect was neither of the petitioners, but rather their co-defendant Andrews.[8] After interviewing the witnesses at the bank, the agents set out in search of the getaway car. This led them to the home of Andrews' mother, Mrs. Mahon. At the hearing on Garrett's motion to suppress, Agent Huntington described his discussion with Mrs. Mahon at her house (R. 63–64):

> A. We explained our purpose for being there, that there had been a robbery committed at the Ben Franklin Savings & Loan Association, and we had reason to believe that Earl Andrews may have been a participant, and we asked general questions relative to Andrews' size, weight, what he looked like, asked if she had a photograph of him.
>
> Q. What did she say?
>
> A. She said that she did not.
>
> Q. All right. After that, did you have a further conversation with her?
>
> A. Yes, sir. After having been in there for quite some time, we asked her if we could look around, because of the possibility—because the possibility existed that Earl Andrews may be in the house at that moment.

On cross-examination by counsel for Garrett, the agent was asked what time it was when he had concluded that Andrews was a suspect. He replied (R. 65):

> A. Well, contemporaneous with the time that we entered the house, 5:15; this was only a half

[8] Simmons' counsel acknowledged this in closing argument (Tr. 586).

block, you see, from where the automobile was found. So this is just instantaneously.

The discovery at Mrs. Mahon's home of items connected to the robbery fortified the agents' belief that Andrews had been involved in the offense. Thus, on the following day, when they interviewed his sister, Pat Jones, they requested pictures of Andrews (R. 81). In addition, the agents obtained a coat which they had reason to believe belonged to Andrews (R. 43). It was at that time that they received information causing the agents to suspect that Andrews' brother-in-law, petitioner Simmons, might have been involved in the felony (R. 44). Accordingly, the agents sought and secured pictures of him as well.

The F.B.I. agents obtained at least six snapshots from Mrs. Jones. They consisted mostly of group pictures of Simmons, Andrews and others. Later that day they displayed the photographs to each of the eyewitnesses, in separate interviews. All but one of the snapshots were the same size, and that one, larger than the others, was not identified as a picture of Simmons (R. 11, 52–53). Although Andrews was prominently featured in the collection of pictures, not one of the witnesses identified him. Of the pictures shown to the witnesses, Mazaika identified two of Simmons (R. 53), Mrs. Babick and Miss Dziedzic selected "two or three" of Simmons,[9] and Mrs. Parlia-

[9] Witness Babick could not recall the number of pictures shown to her more definitely than that these were "lots of them" (R. 55). Another witness, Bialek, testified that at her first viewing she saw "fifty or more" pictures (R. 68–69).

man chose three, including one which resembled Simmons more than the others (R. 73).

3. SUBSEQUENT CONTACTS BETWEEN FEDERAL AGENTS AND EYEWITNESSES

It is beyond dispute that the government relied and intended to rely solely upon in-court identifications of petitioners made by the eyewitnesses at trial. All testimony regarding the extrajudicial identifications was adduced during cross-examination of these witnesses by defense counsel in an effort to establish his claim of a violation of due process. Witnesses Mazaika and Babick were not asked by defense counsel whether they had seen pictures on any occasion after February 28, the date following the robbery. In fact, they were not interviewed by the F.B.I. after that date. Mrs. Bialek testified that she viewed pictures several times (R. 70). She was not asked the number of pictures seen on occasions subsequent to the first viewing, when, she stated, she had been shown more than fifty photographs. The witness did indicate that she was able to identify pictures of both petitioners at the subsequent viewing (R. 70–71). She could not recall the last time she had been shown pictures, except that it had been the previous year.[10] Mrs. Parliaman stated that she was shown pictures on three occasions: the day following the interview, a week thereafter, and when subpoenaed (R. 29, 75). On the last occasion, at a pretrial conference with the Assistant United States Attorney, she was shown about seven pictures, which,

[10] Trial was held in February 1965.

at trial, she identified as being of Simmons, Garrett, and Andrews. She was also asked to review the statement she had given at the time of the robbery (R. 76). At the viewing a week after the robbery, she had been shown twenty pictures (R. 30), from which she identified one of Garrett. Witness Dziedzic was shown pictures twice after the first interview: three weeks after the robbery, when the number of pictures shown to her was increased (R. 80), and shortly before trial, when the prosecuting attorney displayed four pictures, of which two were of Simmons and none was of Garrett (R. 32).

On the day of trial, several of the witnesses recognized Simmons in the courtroom building prior to the commencement of trial (R. 8, 16, 18, 25). One of the witnesses rejected a suggestion by the defense counsel on cross-examination that the prosecuting attorney had pointed him out by saying, "There is one of the guys" (R. 16).

The preceding summary negates the claim that Simmons' right to due process was violated by the procedures used by the F.B.I. agents or the government attorney to obtain identifications of the robbers. Initially, the agents obtained verbal descriptions of the culprits; they had, at the time, no pictures to display. The day following the robbery, when pictures were first shown to the eyewitnesses, no discussions were conducted. The witnesses were not informed of any progress made during the course of the investigation. While the exact number of pictures shown does not clearly appear from the record, it does appear that

at least six were shown at each viewing.[11] The witnesses were not together when shown the pictures; the arrangement and display did not suggest that the pictures of Simmons should be chosen; and the photographs were, at least primarily, group pictures which depicted more than one individual. The testimony of the eyewitnesses does not support any contention that they were coached into identifying Simmons. All of the witnesses positively identified Simmons as one of the robbers, although interviewed individually. Their ability to recognize him, which was fairly and adequately tested, was the result of their excellent opportunity to observe him during the robbery.

On the subsequent occasion when pictures were shown to some of the witnesses by the agents, the number displayed was materially increased, and the witnesses were still told nothing of the progress made by the F.B.I. in its investigation (R. 74).[12] Fewer pictures were available at the later showing of photographs to some—but not all—of the eyewitnesses at

[11] Wall, *Eye-Witness Identification in Criminal Cases* 77 (1965), comments: "How many photographs should be included in the group which is shown to the witness? In England, the usual number is eight or ten, and this number may be the minimum required by police regulations. English judges have been known to comment unfavorably, when summing up to the jury, upon the showing of merely six. In Paris, the number shown ranges from fifteen to twenty. Obviously there is no magic number here, but the number should be large enough to present a fair test of the witness's ability to make an identification."

[12] The viewing of pictures subsequent to the first display apparently coincided with the arrest of Garrett in Tennessee approximately one week after the robbery on March 6, 1964. Garrett was detained in a Nashville prison.

pretrial conferences. In light of their prior positive identifications of Simmons, however, neither the manner nor time of this viewing was improper. This seems clearly so since these witnesses had at a much earlier point positively identified Simmons, under wholly proper conditions, as one of the robbers. Thus, this later viewing by several of the witnesses could in no significant way have affected the propriety of the whole procedure. Rather, it was of the same character as the review with a witness of a statement made at an earlier time or other similar steps taken by counsel in preparing a witness for trial. Moreover, this later procedure, like the previous viewings, did not focus the attention of the witnesses improperly upon Simmons alone.

Recently, several commentators have outlined the possible evils emanating from an improper application by criminal investigators of methods used to obtain an identification of an accused. See, *e.g.*, Fogelson, *Control of Procedures for Identifying a Suspect*, 12 J.For. Sci. 135 (1967); Note, *Due Process in Extra-Judicial Identifications*, 24 Wash. & Lee L.R. 107 (1967); Wall, *Eye-Witness Identification in Criminal Cases* (1965). The latter writer, cited extensively by this Court in the *Wade* opinion (*e.g.*, 388 U.S. at 228–230, 232) has listed a number of "danger signals" which, he believes, increase the probability of a mistaken identification (Wall, *supra*, 90–130). They are:

1. The witness originally stated that he would be unable to identify anyone.

2. The identifying witness knew the defendant prior to the crime, but made no accusa-

tion against him when questioned by the police.

3. A serious discrepancy exists between the identifying witness's original description of the perpetrator of the crime and the actual description of the defendant.

4. Before identifying the defendant at the trial, the witness erroneously identified some other person.

5. Other witnesses to the crime fail to identify the defendant.

6. Prior to trial, the witness sees the defendant but fails to identify him.

7. Before the crime was committed, the witness had a very limited opportunity to see the defendant.

8. The witness and the person identified are of different racial groups.

9. During his original observation of the perpetrator of the crime, the witness was unaware that a crime situation was involved.

10. A considerable period of time elapsed between the witness's view of the criminal and his identification of the defendant.

11. The crime was committed by a number of persons.

12. The witness fails to make a positive identification.

None of these factors, except No. 7, was present in the instant case. And, as to opportunity to observe, while the witnesses saw the robbers for only a few minutes, their unmarred view of Simmons at the time of the robbery and their identification before time dulled their memory eliminates this factor as a potential danger.

In sum, the investigative procedures used by the F.B.I. to obtain an identification of Simmons were plainly consonant with due process of law. Pictures of suspects were shown to the eyewitnesses as soon as possible after the robbery.[13] There is no indication that any of the pictures contained any notations or suggestive poses that would direct the viewer's attention to it, and cause him to select it without relying upon the memory of his personal observation of the suspect. Cf. *Barnes* v. *United States,* 365 F. 2d 509 (C.A.D.C.). The record refutes petitioners' contention that the F.B.I. affirmatively suggested that any eyewitness identify a particular picture of Simmons. The subsequent attempts to assure that proper identification of both petitioners had been made in no way unfairly focused the attention of the eyewitnesses upon Simmons. A thorough cross-examination of the eyewitnesses was conducted by defense counsel. As pointed out by the court of appeals (R. 87), in such a situation "the weight to be given the identification testimony of the government witnesses was properly entrusted to the jury." Considering all the circumstances, the combined identification testimony of all five witnesses, including their ability to identify characteristics other than mere facial features, was plainly sufficient to ensure that petitioners were properly identified as the bank robbers. Thus, there was no violation of petitioners' Fifth Amendment right to due process.

[13] "Interests of the accused and society alike demand that this opportunity be afforded at the earliest possible moment." *United States ex rel. Stovall* v. *Denno*, 355 F. 2d 731, 736 (C.A. 2), affirmed, 388 U.S. 293.

II. THE TRIAL COURT PROPERLY RULED THAT THE PHOTOGRAPHS WERE NOT REQUIRED TO BE PRODUCED UNDER 18 U.S.C. 3500

At the conclusion of the direct examination of the first eyewitness, Mazaika, government counsel turned over a three-page statement obtained from the witness on the day of the robbery, pursuant to 18 U.S.C. 3500, the so-called Jencks Act. On cross-examination, Mazaika stated that the day following the robbery he had identified Simmons from photographs furnished by the F.B.I. agents, indicating that he had been shown approximately six snapshots, some depicting more than one individual, and had selected one or two of petitioner Simmons (R. 52–53). Defense counsel then requested production of the photographs "under 3500" (R. 53). Government counsel interposed no objection, but submitted that the photographs did not qualify as "statements" producible under the statute. He indicated that there existed a "multitude" of photographs, and that he had sent a special agent to attempt to secure them, but that they might not be able to identify the particular photographs which had been shown to the witness (R. 54). The trial judge, after examining the written statement, concluded that the photographs were not an integral part of that statement and that the government was not required to produce them. Accordingly, the court ruled that he would not delay the trial until the pictures were obtained, and ordered defense counsel to continue his cross-examination. At the end of the cross-examination, counsel once more moved for the production of the pictures. The court denied the motion (R. 54).

The next witness, Mrs. Babick, testified on cross-examination [14] that sometime after the robbery she had been shown "lots of" pictures, of which two or three depicted petitioner Simmons (R. 55–56). A request for the production of these pictures "pursuant to 3500" was denied (R. 56–57). A third eyewitness, Mrs. Bialek, told defense counsel that government agents showed pictures to her "several times" (R. 70). The first occasion, on the day after the robbery, she viewed fifty or more (R. 68–69). Counsel's request for the production of all these pictures was denied, the court then indicating that its ruling would apply to all such pictures and that it was unnecessary to repeat the motion (R. 71). The next witness, Mrs. Parliaman, testified that she saw some snapshots on February 28, ten to twenty pictures a week later (when she identified one of Garrett), and about seven photographs shortly before trial (R. 29–30, 73–76). The final witness, Miss Dziedzic, declared that she saw five or six photographs the first time, an indeterminate number approximately three weeks later, and about four shortly before trial (R. 78–80). Petitioners contend that the trial court's ruling denying production of all these photographs constituted reversible error.

A. NEITHER THE EXPRESS LANGUAGE NOR THE LEGISLATIVE HISTORY OF THE JENCKS ACT SUPPORTS THE CONTENTION THAT IT WAS INTENDED TO REQUIRE THE PRODUCTION OF PHOTOGRAPHS

Both the express language and the legislative history of 18 U.S.C. 3500 make it clear that Congress,

[14] Jencks Act statements of this witness and other eyewitnesses who were questioned about viewing pictures were produced prior to the commencement of cross-examination (R. 54).

in response to this Court's holding in *Jencks* v. *United States,* 353 U.S. 657, promulgated a federal rule of criminal procedure to govern the future application of the *Jencks* principle. Exclusive standards were established for determining whether a "statement" or "report" of a government witness to an agent, in possession of the United States, must be produced for use in impeaching the witness on cross-examination. *Palermo* v. *United States,* 360 U.S. 343.

The term "statement" is defined in 18 U.S.C. 3500 as (1) a written statement signed or otherwise adopted or approved by the witness, or (2) a substantially verbatim recital of an oral communication of the witness recorded contemporaneously with the making of the oral statement (see *supra,* p. 2). Photographs do not fall within either category. *Ahlstedt* v. *United States,* 325 F. 2d 257, 258–259 (C.A. 5), certiorari denied, 377 U.S. 968. As stated in *United States* v. *Zurita,* 369 F. 2d 474, 477 (C.A. 7), certiorari denied, 386 U.S. 1023, "A picture may be worth a thousand words, but it does not record those words or reproduce them or, indeed, even indicate what they are." Apart from the fact that photographs are not writings, they do not originate with the witness and are not ordinarily his communications.[15] While it is possible to conceive of a situation in which a photograph may be so interrelated with a statement as to be an indispensable part of it, the trial court specifically found that that was not the case here when it reviewed the

[15] In *Palermo* v. *United States, supra,* in discussing the legislative purpose underlying the enactment of 18 U.S.C. 3500, the Court pointed out that "Congress was concerned that only those

written statements which the government turned over to defense counsel.[16] Indeed, the statements of the eye-witnesses were taken the day of the robbery, before any pictures were even available for viewing by them.[17]

The legislative history provides convincing support for the conclusion that photographs and pictures are not *per se* producible under the Jencks Act. After the conference committee of the House and Senate had agreed upon the wording of the statute, Senator O'Mahoney, the floor manager in the Senate, presented this version for approval. A discussion commenced concerning the scope of the "records" which the statute would order to be produced. The following ensued (103 Cong. Rec. 16489):

> Mr. KEFAUVER. Let me inquire of the chairman of the subcommittee and the chairman of the conference committee whether the word "records" includes photostats of documents and pictures, all of which are very important

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statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment" (360 U.S. at 352). Reflecting this approach in determining the reach of that statutory provision, the Fifth Circuit concluded in *Ahlstedt* that the Jencks Act "does not apply to miscellaneous photographs," and does "not require the production of the entire investigative files" (325 F. 2d at 259).

[16] Petitioners' statement "that the witnesses incorporated the pictures by reference in their statements" (Pet. Br. 14) is not supported by the record and squarely conflicts with the trial court's determination that the pictures were "no part" of the witnesses' statements (R. 54).

[17] No pictures were displayed until February 28, the day after the offense was committed. Contrary to petitioners' assertion (Pet. Br. 14), the pictures could not have been used to obtain statements from the witnesses since no pictures were then available.

in the presentation of a criminal case, and just where they fall within this definition?

Mr. O'MAHONEY. We are not dealing with records in the sense of the question asked by the Senator from Tennessee. We are dealing only with records which are included in the definition here, statements by the witness, which have been approved by him or signed by him or otherwise approved by him, and then oral statements which have been recorded—oral statements made by the witness to an agent of the Government. This is tied directly to statements made by a Government witness to an agent of the Government after the witness has testified, and not to any other records of the FBI or of any other Government bureau.

In light, then, of the plain language of the statute, confirmed by the legislative history, it is clear that the Jencks Act does not, as a general matter, require the production of photographs shown to witnesses by the government. What authority exists on the question supports the court of appeals' view that the Jencks Act does not extend to "a photograph which is not part of a statement as there defined" (R. 87). Thus, the courts below properly concluded that petitioners were not entitled to the pictures sought under 18 U.S.C. 3500.

B. THE TRIAL COURT'S FAILURE TO ORDER PRODUCTION OF THE PHOTOGRAPHS DID NOT, UNDER THE CIRCUMSTANCES, CONSTITUTE AN ABUSE OF DISCRETION

Of course, although pictures do not fall within the literal language of 18 U.S.C. 3500, the trial court

nevertheless had discretion to order their production under *Goldman* v. *United States,* 316 U.S. 129, 132.[18] In the circumstances of this case, however, we do not believe the failure to direct production can be deemed an abuse of discretion. In presenting its case, the government relied upon the positive courtroom identifications of Simmons and Garrett by eyewitnesses to the robbery, and did not bring out the fact that the witnesses had earlier identified photographs of petitioners. Thus, there was no reason for government counsel to have had the numerous photographs shown to the witnesses at various times—some a year earlier—ready for production at trial. Manifestly, he had no intention of using them as part of the government's case, and considered their role in the identification of petitioners a minor one, although he indicated his willingness to attempt to locate the pictures and provide them to petitioners' counsel (R. 54).

Most of the pictures shown to the witnesses were, of course, not identified as portraying either of the petitioners. In the normal course of investigative procedure, these pictures would have been returned to their source, generally a central file, from which they could be secured by other investigators for use if circumstances so required. It is thus doubtful whether all the photographs shown to the witnesses could have

[18] It should be noted that petitioners never phrased their request for production except in Jencks Act terms, and make no abuse of discretion argument in their brief in this Court. Rather, petitioners' contention is that production was required under 18 U.S.C. 3500 because of the relationship between the witnesses' statements and the pictures they were shown (see Pet. Br. 13–15).

been located and accurately identified by the government. Of course, the removal of every picture which might have been shown to the five eyewitnesses from the police files for the extensive period of time between their use and the trial (and, perhaps, until the appellate review had been completed), in anticipation that defense counsel might request their production at trial, would ensure their availability. Such a requirement would, however, seem unnecessarily disruptive of the orderly functioning of law-enforcement activities. Indeed, a rule which would require the keeping of all photographs shown to witnesses in special files pending completion of each and every criminal proceeding would be quite cumbersome and might significantly impair efficient criminal investigation. This seems so especially where, as here, the number of pictures shown was large and they were not essential for establishing the identity of the defendants at trial. The required production of all the photographs shown to the witnesses would, under these circumstances, merely have brought the trial to a needless standstill and injected collateral issues of no import to the real issue of guilt or innocence.

In the instant situation it was the defense which first brought the matter of photographs into the case by its cross-examination of the eyewitnesses. Although defense counsel conducted lengthy interrogations of these individuals, the testimony so elicited, far from negating the ability of the witnesses to identify petitioners, showed that they were able without difficulty to identify the robbers they had observed from the pictures, and could and did pick them out from group

photographs containing others.[19] In these circumstances, the trial court could properly determine that the defense had shown no such need for the photographs as would warrant delaying the trial until they could be located, identified and produced. Indeed, the in-court identifications here were so strong and conclusive that, even if the failure of the court to order production could be deemed error, petitioners can show no prejudice from the absence of the photographs.

III. THE TESTIMONY OF PETITIONER GARRETT AT A HEARING ON HIS MOTION TO SUPPRESS WAS PROPERLY ADMITTED INTO EVIDENCE AT TRIAL

1. Initially, it is important to detail the factual circumstances out of which this particular contention of petitioners arises. On the second day of trial (not prior to trial, as ordinarily contemplated by Rule 41(e), F.R. Crim. P.), petitioner Garrett filed a motion to suppress and return Government Exhibit 4, a suitcase—one of the two seized by the agents at Mrs. Mahon's house—and its contents.[20] The court ruled that it would hear the motion when the government was about to introduce evidence pertaining to it (Tr.

[19] Had the witnesses in fact been coached or otherwise influenced in viewing the pictures, it seems strange that none of them identified Andrews—whom none had actually observed but whose picture appeared frequently in the photographs they viewed (see R. 71). This confirms not only the propriety of the identifications of the two petitioners, but also that the pictures would have been of little if any assistance to them in cross-examining these eyewitnesses.

[20] The other suitcase seized (Gov't Exh. 3) was not admitted into evidence since it was not adequately connected up or shown to be relevant (see R. 37).

74–75). That afternoon, as a government witness was about to testify that she had seen Garrett with a blue cloth container (similar to one found in Gov't Exh. 4) into which the stolen money was put, the jury was excused. The court asked Garrett's counsel whether he intended to have the movant testify in connection with the motion. Counsel replied, "Only to identify the property that has been—the property that will be discussed". (Tr. 177). Garrett then testified that he arrived in Chicago on the morning of February 27 (the day of the robbery) and placed his suitcase in the basement of Mrs. Mahon's house; that he left the house and returned in the late afternoon; and that he thereafter departed, leaving his suitcase behind. Garrett did not return to the house, and left Chicago the next day (Tr. 186–200). When shown Government Exhibit 4, Garrett said he was not sure that this was the suitcase he had placed in Mrs. Mahon's basement. He identified only the clothes in the suitcase as his (R. 20, 58). Mrs. Mahon, testifying in Garrett's behalf, said that she asked the agents not to take the suitcases, but that they did (R. 60). On cross-examination she said she had never seen anyone bring the suitcases into the house, did not know to whom they belonged, and had never given anyone permission to put them there (R. 61).

The agents testified that they told Mrs. Mahon that they believed her son Andrews was involved in the robbery, and that she consented to the search and took them to the basement of the house. When they found the suitcases, Mrs. Mahon said she did not know to whom they belonged. She consented to the agents'

opening the suitcases. When the agents discovered the money they asked Mrs. Mahon if they could take the suitcases, and she said, "Yes, you can. They don't belong to me" (R. 65).

The court, after hearing all the evidence on the motion to suppress, denied it. At the end of the day, after the jury had been excused, government counsel asked whether Garrett's counsel, Mr. Ginsberg, would consider stipulating that his client had identified the clothing found in Government Exhibit 4 as belonging to him. The following day, when it became apparent that counsel would not enter into such a stipulation, government counsel announced his intention to call the court reporter as a witness. Over defense counsel's objection the reporter testified before the jury that, at the hearing on the motion to suppress, Garrett had identified the clothes in the suitcase as his, and had stated that he had put a suitcase in the asement of Mrs. Mahon's house on the day of the offense (Tr. 386–399; R. 33–35). The court instructed the jury that this evidence was received only as to Garrett, and was not to be considered insofar as the other defendants were concerned (R. 35).

2. Petitioner Garrett's contention that, in order to assert his Fourth Amendment right to suppress illegally seized evidence, he was "compelled" to waive his Fifth Amendment right not to take the stand or incriminate himself, must be judged in the light of all of the underlying facts. It is clear, as Garrett obviously knew, that, at the time the search was made, no possible right of privacy relating to him appeared to be involved. He had no proprietary interest in the

premises involved. Mrs. Mahon, who testified in his behalf in support of the motion to suppress, stated that she had never seen him before and had given no one permission to leave a suitcase in her basement (R. 61). Had she or anyone with authority given him permission, such person could have established Garrett's interest in the premises, without his taking the stand. There was nothing on the outside of the suitcase that would identify it as Garrett's. It could not even be said that the "search" was directed at Garrett, for the evidence is clear that the F.B.I. agents at the time regarded Andrews as the only person implicated in the robbery, by reason of the discovery of the getaway car.[21] In relation to Garrett's right of privacy, the suitcase was in no different position from one found abandoned on the road.[22]

In these circumstances, Garrett, for his own purposes, sought to take advantage of what he claimed to be an illegal invasion of the privacy of Mrs. Mahon by asserting that the clothes inside the suitcase belonged to him, on the theory that they were excludable since seized in violation of the Fourth Amendment. By so doing, he presumably hoped to keep out of the

[21] Indeed, the agents asked Mrs. Mahon for pictures of Andrews, and were concerned that he might then be in the house (see *supra*, pp. 15–16).

[22] Even if it cannot be said that an abandonment occurred, Garrett at least effectively surrendered possession and control of the suitcase and its contents to Mrs. Mahon by leaving the suitcase in her basement, and thus accepted the risk that she might consent to a search and seizure of the property, as pointed out by the court below (R. 85–86). See, *e.g.*, *Marshall* v. *United States*, 352 F. 2d 1013, 1014 (C.A. 9), certiorari denied, 382 U.S. 1010.

case the evidence of the stolen money, also found in the suitcase, which he must have believed the government could connect up with him. Had his motion succeeded, the testimony he gave in support thereof, as well as the suitcase and its contents, would in all likelihood have been inadmissible; otherwise, it might be thought, the thrust of the exclusionary rule would be subverted. See *Safarik* v. *United States,* 62 F. 2d. 892, 897 (C.A. 8). Garrett was confronted with a tactical decision, which required him to evaluate whether, under the circumstances, the risk accompanying his effort to recover and suppress the evidence was worth assuming.[23] Maguire, *Evidence of Guilt* 218 (1959). And his real complaint is really no more than that, as it turned out, the strategy he chose to follow operated to his disadvantage.

Our system for the administration of justice is based in large part upon the production of evidence, in which the testimony of witnesses plays a large role. The system is also based on the assumption that witnesses are responsible for what they say. It is recognized that sometimes they are not truthful, and various devices are available to test their veracity—cross-examination, the showing of prior inconsistent statements, impeachment, and so on.

But the fact remains that no one, not even a defendant in a criminal case, has any claim or right,

[23] Indeed, the court below, after noting that Garrett's "testimony was voluntary and [was] given under the guidance of his own counsel," concluded that what he in effect sought was protection "from the risks of errors of judgment in trial tactics" (R. 85).

constitutional or otherwise, to testify irresponsibly. He does have a right not to testify at all. And if he exercises that right the fact that he does not testify may not be used against him. This is what *Griffin* v. *California,* 380 U.S. 609, stands for. If, however, he chooses to testify, for any reason, he has no right to give testimony for which he is not responsible. Testimony given on a motion to suppress evidence is not given "for this date and train" only. It is a part of the process of administration of justice which presupposes that testimony is seriously and responsibly given, and is therefore reliable.

If the defendant takes affirmative action, under oath, in open court, he should be responsible for the consequences of that action. In this lies the distinction between this case and *Griffin* v. *California, supra.* In *Griffin,* the defendant did nothing. He took no action. He chose to rely on his undoubted right to refuse to testify. Then, under the system which was in effect in California, and in a few other States, the effect of his right was substantially impaired by the adverse comment which the prosecutor was free to make, and to which the judge could refer in his charge. Thus, the defendant had no clear choice. There was no way in which he could maintain his privilege not to testify without impairment. By merely remaining silent, and doing nothing, he subjected himself to consequences which, almost inevitably, took away much of the substance of the privilege.

In the present case, however, the defendant always remained free to exercise his Fifth Amendment privi-

lege against testifying. No one sought to compel him to testify, at any time, either at his trial, or before his trial. The defendant also had the unfettered right to move to suppress evidence which had been obtained by an illegal search. He remained free to support such a claim by any available evidence, including his own testimony, if he chose to give it. Whether he should testify was for him alone to decide. But he should not be heard to disclaim whatever testimony he chooses to give; that testimony, like any other testimony given under oath, in open court, was given without reservation or qualification, and it should be available for use if it becomes relevant in connection with his trial. This is simply the normal consequence of an intentional waiver of the privilege against self-incrimination.

Any defendant who takes the stand for any purpose is to a greater or lesser extent on the horns of a dilemma since anything he says may, in the same proceeding or in another context, be used against him. *Walder* v. *United States,* 347 U.S. 62; *Perlman* v. *United States,* 247 U.S. 7; *Edmonds* v. *United States,* 273 F. 2d 108 (C.A.D.C.), certiorari denied, 362 U.S. 977; *Ayres* v. *United States,* 193 F. 2d 739 (C.A. 5). Thus, in every criminal case the defendant must make a decision whether to testify in his defense and perhaps succeed only in aiding the prosecution. That risk is especially acute when he admits doing the act charged but pleads self-defense, or denies culpability

on the ground of entrapment or insanity. There, as here, it may be said that a "cruel choice" is imposed; that the defendant is often "compelled" to take the stand in order to exercise his right to establish a special defense. Yet, in none of these cases is the defendant permitted to waive his Fifth Amendment privilege only for his own advantage: his testimony, although offered in defense, is admitted for all purposes and may serve to furnish an essential link in establishing his guilt. What was said in *Raffel* v. *United States,* 271 U.S. 494, 497, 499, with respect to the defendant's exposure to cross-examination when he voluntarily becomes a witness is fully applicable here: "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will * * *. The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness."

Nor is voluntary testimony given at one hearing or trial normally inadmissible in a subsequent criminal proceeding. The Fifth Amendment does not, for instance, bar the use of a defendant's exculpatory courtroom statement at his later trial for perjury. See *United States* v. *Williams,* 341 U.S. 58. And, similarly, the defendant's evidence at a preliminary examination is admissible as an admission against interest at

his subsequent trial. *Powers* v. *United States,* 223 U.S. 303.[24]

Why, then, should the rule be different with respect to voluntary testimony given on a motion to suppress? The lower courts have seen no reason to make a special exception here. On the contrary, the law is well-settled that testimony offered by the movant at an unsuccessful hearing on his motion to suppress can be introduced in evidence as an admission against interest. Thus, in *Heller* v. *United States,* 57 F. 2d 627 (C.A. 7), certiorari denied, 286 U.S. 567, the appellant complained about the introduction at trial of testimony given by him at such a hearing, to the effect that the house searched was his residence. There the Seventh Circuit stated (57 F. 2d at 629):

> If Heller had made such a statement out of court, it undoubtedly could have been shown upon the trial, by testimony of those who heard him make it, in any undertaking by the government to show his relation to the place where the crime was charged to have been committed. We

[24] So, also, it is settled that a defendant who chooses to establish a just claim for a change of venue will not be heard to complain that to assert his right to an impartial jury trial he was compelled to waive his Sixth Amendment right to a speedy trial or to trial in the vicinage. See *United States* v. *Dennis,* 183 F. 2d 201, 226 (C.A. 2), affirmed, 341 U.S. 494; *Delaney* v. *United States;* 199 F. 2d 107, 112 (C.A. 1); *Harney* v. *United States,* 306 F. 2d 523, 532 n. 4 (C.A. 1), certiorari denied *sub nom. O'Connell* v. *United States,* 371 U.S. 911. Similarly, a defendant who voluntarily chose to make what he regarded as an exculpatory statement cannot successfully object to the admission of parts of that statement which inculpate him in some way. *E.g., Word* v. *United States,* 199 F. 2d 625 (C.A. 10), certiorari denied, 345 U.S. 936; see generally 1 Wharton, *Criminal Evidence* 661 (1955).

> cannot see why this should be less so if the statement he had made was in court and under the solemnity of an oath. He was not obliged to testify upon the motion any more than upon the trial. Had he testified at the trial denying it was his residence, the testimony he previously gave to the contrary might have been used for his impeachment. If there were a second trial of the same case, any admissions he made as a witness upon the first trial could be shown against him on the second, although on the second he did not testify.

Similarly, in *United States* v. *Taylor,* 326 F. 2d 277 (C.A. 4), certiorari denied, 377 U.S. 931, the Fourth Circuit stated (326 F. 2d at 280):

> Admissions which are * * * wholly voluntary regularly are admitted in criminal cases against defendants; indeed, they are the only admissions which are admissible against them. The fact that * * * the defendants may have been under the justifiable impression that they would be without standing to move to suppress unless they did admit ownership does not warrant the conclusion that the admission was involuntary. In all of the cases which uniformly have approved receipt in evidence of such admissions, the admissions have been made in similar efforts to establish standing to move to suppress.[25]

[25] In *Kaiser* v. *United States*, 60 F. 2d 410 (C.A. 8), certiorari denied, 287 U.S. 654, the court found a like contention "too frivolous to be discussed," since the pretrial testimony was part of "a court record, open to any one for perusal" (60 F. 2d at 413). State courts have similarly held such testimony to be admissible. *Casias* v. *People*, 415 P. 2d 344 (Colo.), certiorari denied, 385 U.S. 979; *Bell* v. *State*, 94 Tex. Cr. 266, 250 S.W. 177; *State* v. *Williams*, 69 Ohio App. 361, 41 N.E. 2d 717; *State* v. *Dersiy*, 121 Wash. 455, 209 Pac. 837.

Finally, we stress that the prevailing rule—permitting the use at trial of a defendant's testimony on a motion to suppress evidence—does not, in practice, usually confront the accused with the impossible choice suggested by petitioners. On the one hand, the decision in *Jones* v. *United States,* 362 U.S. 257, focusing on the very "dilemma" claimed here, resolved the problem for those cases in which the choice was most difficult. The requirement of standing to contest the validity of a search was there relaxed so as to permit a defendant to suppress illegally seized evidence without establishing his interest in it if proof of possession alone would incriminate him. At the other extreme are situations like that reflected by this record, in which the contention that the defendant's right of privacy was violated is essentially frivolous because he has no colorable interest in the premises searched and has effectively abandoned the property seized. In these circumstances, it is a plain overstatement to say that the defendant is put to the "cruel choice" of waiving either his Fourth Amendment right or his Fifth Amendment privilege.

There remain those cases in which special standing must be shown and the claim for suppression is substantial—albeit it ultimately fails. Often, the defendant will be able to establish a sufficient interest in the premises searched without himself testifying. In many other cases, his testimony will not incriminate him. No doubt there will be situations in which the accused must make a close decision. But that is an unavoidable aspect of our adversary system in which the defendant is left free to chart his own course. We submit that the

voluntary choice to testify in support of a motion to suppress should carry the same consequence here as elsewhere—that what is said, if relevant to the question of guilt, may be put before the jury as competent evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 55.—October Term, 1967.

Thomas Earl Simmons et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March 18, 1968.]

Mr. Justice Harlan delivered the opinion of the Court.

This case presents issues arising out of the petitioners' trial and conviction in the United States District Court for the Northern District of Illinois for the armed robbery of a federally insured savings and loan association.

The evidence at trial showed that at about 1:45 p. m. on February 27, 1964, two men entered a Chicago savings and loan association. One of them pointed a gun at a teller and ordered her to put money into a sack which the gunman supplied. The men remained in the bank about five minutes. After they left, a bank employee rushed to the street and saw one of the men sitting on the passenger side of a departing white 1960 Thunderbird automobile with a large scrape on the right door. Within an hour police located in the vicinity a car matching this description. They discovered that it belonged to a Mrs. Rey, sister-in-law of petitioner Simmons. She told the police that she had loaned the car for the afternoon to her brother, William Andrews.

At about 5:15 p. m. the same day, two FBI agents came to the house of Mrs. Mahon, Andrews' mother, about half a block from the place where the car was then parked.[1] The agents had no warrant, and at trial it was

[1] Mrs. Mahon also testified that at about 3:30 p. m. the same day six men with guns forced their way into and ransacked her house. However, these men were never identified, and they apparently took nothing.

disputed whether Mrs. Mahon gave them permission to search the house. They did search, and in the basement they found two suitcases, of which Mrs. Mahon disclaimed any knowledge. One suitcase contained, among other items, a gun holster, a sack similar to the one used in the robbery, and several coin cards and bill wrappers from the bank which had been robbed.

The following morning the FBI obtained from another of Andrews' sisters some snapshots of Andrews and of petitioner Simmons, who was said by the sister to have been with Andrews the previous afternoon. These snapshots were shown to the five bank employees who had witnessed the robbery. Each witness identified pictures of Simmons as representing one of the robbers. A week or two later, three of these employees identified photographs of Garrett as depicting the other robber, the other two witnesses stating that they did not have a clear view of the second robber.

The petitioners, together with William Andrews, subsequently were indicted and tried for the robbery, as indicated. Just prior to the trial, Garrett moved to suppress the Government's exhibit consisting of the suitcase containing the incriminating items. In order to establish his standing so to move, Garrett testified that, although he could not identify the suitcase with certainty, it was similar to one he had owned, and that he was the owner of clothing found inside the suitcase. The District Court denied the motion to suppress. Garrett's testimony at the "suppression" hearing was admitted against him at trial.

During the trial, all five bank employee witnesses identified Simmons as one of the robbers. Three of them identified Garrett as the second robber, the other two testifying that they did not get a good look at the second robber. The District Court denied the petitioners' request under 18 U. S. C. § 3500 (the so-called

Jencks Act) for production of the photographs which had been shown to the witnesses before trial.

The jury found Simmons and Garrett, as well as Andrews, guilty as charged. On appeal, the Court of Appeals for the Seventh Circuit affirmed as to Simmons and Garrett, but reversed the conviction of Andrews on the ground that there was insufficient evidence to connect him with the robbery. 371 F. 2d 296.

We granted certiorari as to Simmons and Garrett, 388 U. S. 906, to consider the following claims. *First*, Simmons asserts that his pretrial identification by means of photographs was in the circumstances so unnecessarily suggestive and conducive to misidentification as to deny him due process of law, or at least to require reversal of his conviction in the exercise of our supervisory power over the lower federal courts. *Second*, both petitioners contend that the District Court erred in refusing defense requests for production under 18 U. S. C. § 3500 of the pictures of the petitioners which were shown to eyewitnesses prior to trial. *Third*, Garrett urges that his constitutional rights were violated when testimony given by him in support of his "suppression" motion was admitted against him at trial. For reasons which follow, we affirm the judgment of the Court of Appeals as to Simmons, but reverse as to Garrett.

I.

The facts as to the identification claim are these. As has been noted previously, FBI agents on the day following the robbery obtained from Andrews' sister a number of snapshots of Andrews and Simmons. There seem to have been at least six of these pictures, consisting mostly of group photographs of Andrews, Simmons, and others. Later the same day, these were shown to the five bank employees who had witnessed the robbery at their place of work, the photographs being exhibited to each

employee separately. Each of the five employees identified Simmons from the photographs. At later dates, some of these witnesses were again interviewed by the FBI and shown indeterminate numbers of pictures. Again, all identified Simmons. At trial, the Government did not introduce any of the photographs, but relied upon in-court identification by the five eyewitnesses, each of whom swore that Simmons was one of the robbers.

In support of his argument, Simmons looks to last Term's "lineup" decisions—*United States* v. *Wade*, 388 U. S. 218, and *Gilbert* v. *California*, 388 U. S. 263—in which this Court first departed from the rule that the manner of an extra-judicial identification affects only the weight, not the admissibility, of identification testimony at trial. The rationale of those cases was that an accused is entitled to counsel at any "critical stage of the prosecution," and that a post-indictment lineup is such a "critical stage." See 388 U. S., at 236–237. Simmons, however, does not contend that he was entitled to counsel at the time the pictures were shown to the witnesses. Rather, he asserts simply that in the circumstances the identification procedure was so unduly prejudicial as fatally to taint his conviction. This is a claim which must be evaluated in light of the totality of surrounding circumstances. See *Stovall* v. *Denno*, 388 U. S. 293, at 302; *Palmer* v. *Peyton*, 359 F. 2d 199. Viewed in that context, we find the claim untenable.

It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make

an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.[2] The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime.[3] Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.[4]

Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermis-

[2] See P. Wall, Eye-Witness Identification in Criminal Cases 74–77 (1965).

[3] See *id.*, at 82–83.

[4] See *id.*, at 68–70.

sibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. This standard accords with our resolution of a similar issue in *Stovall* v. *Denno,* 388 U. S. 293, 301–302, and with decisions of other courts on the question of identification by photograph.[5]

Applying the standard to this case, we conclude that petitioner Simmons' claim on this score must fail. In the first place, it is not suggested that it was unnecessary for the FBI to resort to photographic identification in this instance. A serious felony had been committed. The perpetrators were still at large. The inconclusive clues which law enforcement officials possessed led to Andrews and Simmons. It was essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities. The justification for this method of procedure was hardly less compelling than that which we found to justify the "one-man lineup" in *Stovall* v. *Denno, supra.*

In the second place, there was in the circumstances of this case little chance that the procedure utilized led to misidentification of Simmons. The robbery took place in the afternoon in a well-lighted bank. The robbers wore no masks. Five bank employees had been able to see the robber later identified as Simmons for periods ranging up to five minutes. Those witnesses were shown the photographs only a day later, while their memories were still fresh. At least six photographs were displayed to each witness. Apparently, these consisted primarily of group photographs, with Simmons and Andrews each appearing several times in the series. Each witness was alone when he or she saw the photographs. There is no evidence to indicate that the witnesses were told anything about the progress of the investigation, or that the FBI agents

[5] See, *e. g., People* v. *Evans,* 39 Cal. 2d 242, 246 P. 2d 636.

in any other way suggested which persons in the pictures were under suspicion.

Under these conditions, all five eyewitnesses identified Simmons as one of the robbers. None identified Andrews, who apparently was as prominent in the photographs as Simmons. These initial identifications were confirmed by all five witnesses in subsequent viewings of photographs and at trial, where each witness identified Simmons in person. Notwithstanding cross-examination, none of the witnesses displayed any doubt about their respective identifications of Simmons. Taken together, these circumstances leave little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some respects fallen short of the ideal.[6] We hold that in the factual surroundings of this case the identification procedure used was not such as to deny Simmons due process of law or to call for reversal under our supervisory authority.

II.

It is next contended, by both petitioners, that in any event the District Court erred in refusing the defendants' request that the photographs shown to the witnesses prior to trial be turned over to the defense for purposes

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[6] The reliability of the identification procedure could have been increased by allowing only one or two of the five eyewitnesses to view the pictures of Simmons. If thus identified, Simmons could later have been displayed to the other eyewitnesses in a lineup, thus permitting the photographic identification to be supplemented by a corporeal identification, which is normally more accurate. See P. Wall, Eye-Witness Identification in Criminal Cases 83 (1965); C. Williams, Identification Parades, 1955 Crim. L. Rev. 525, 531. Also, it probably would have been preferable for the witnesses to have been shown more than six snapshots, for those snapshots to have pictured a greater number of individuals, and for there to have been proportionally fewer pictures of Simmons. See Wall, *supra*, at 74–82; Williams, *supra*, at 530.

of cross-examination. This claim to production is based on 18 U. S. C. § 3500, the so-called Jencks Act. That Act, passed in response to this Court's decision in *Jencks v. United States,* 353 U. S. 657, provides that after a witness has testified for the Government in a federal criminal prosecution the Government must, on request of the defense, produce any "statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." For the Act's purposes, as they relate to this case, a "statement" is defined as "a written statement made by said witness and signed or otherwise adopted or approved by him; . . . ."

Written statements of this kind were taken from all five eyewitnesses by the FBI on the day of the robbery. Apparently none were taken thereafter. When these statements were produced by the Government at trial pursuant to § 3500, the defense also claimed the right to look at the photographs "under 3500." The District Judge denied these requests.

The petitioners' theory seems to be that the photographs were incorporated in the written statements of the witnesses, and that they therefore had to be produced under § 3500. The legislative history of the Jencks Act does confirm that photographs must be produced if they constitute a part of a written statement.[7] However, the record in this case does not bear out the petitioners' claim that the pictures involved here were part of the statements which were approved by the witnesses and,

[7] In the discussion of the bill on the floor of the Senate, Senator O'Mahoney, sponsor of the bill in the Senate, stated that photographs *per se* were not required to be produced under the bill, but that "If the pictures have anything to do with the statement of the witness . . . of course that would be part of it . . . ." 103 Cong. Rec. 16489.

therefore, producible under § 3500. It appears that all such statements were made on the day of the robbery. At that time, the FBI and police had no pictures of the petitioners. The first pictures were not acquired and shown to the witnesses until the morning of the following day. Hence, they could not possibly have been a part of the statements made and approved by the witnesses the day of the robbery.

The petitioners seem also to suggest that, quite apart from § 3500, the District Court's refusal of their request for the photographs amounted to an abuse of discretion. The photographs were not referred to by the Government in its case-in-chief. They were first asked for by the defense after the direct examination of the first eyewitness, on the second day of the trial. When the defense requested the pictures, counsel for the Government noted that there were a "multitude" of pictures and stated that it might be difficult to identify those which were shown to particular witnesses. However, he indicated that the Government was willing to furnish all of the pictures, if they could be found. The District Court, referring to the fact that production of the photographs was not required under § 3500, stated that he would not stop the trial in order to have the pictures made available.

Although the pictures might have been of some assistance to the defendants, and although it doubtless would have been preferable for the Government to have labeled the pictures shown to each witness and kept them available for trial,[8] we hold that in the circumstances the refusal of the District Court to order their production did not amount to an abuse of discretion, at least as to

[8] See P. Wall, Eye-Witness Identification in Criminal Cases 84 (1965); C. Williams, Identification Parades, 1955 Crim. L. Rev. 525, 530.

petitioner Simmons.[9] The defense surely knew that photographs had played a role in the identification process. Yet there was no attempt to have the pictures produced prior to trial pursuant to Fed. Rules Crim. Proc. 16. When production of the pictures was sought at trial, the defense did not explain why they were needed, but simply argued that production was required *under § 3500*. Moreover, the strength of the eyewitness identifications of Simmons renders it highly unlikely that nonproduction of the photographs caused him any prejudice.

III.

Finally, it is contended that it was reversible error to allow the Government to use against Garrett on the issue of guilt the testimony given by him upon his unsuccessful motion to suppress as evidence the suitcase seized from Mrs. Mahon's basement and its contents. That testimony established that Garrett was the owner of the suitcase.[10]

In order to effectuate the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures,

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[9] Garrett was also initially identified from photographs, but at a later date than Simmons. He was identified by fewer witnesses than was Simmons, and even those witnesses had less opportunity to see him during the robbery than they did Simmons. The record is opaque as to the number and type of photographs of Garrett which were shown to these witnesses, and as to the circumstances of the showings. However, it is unnecessary to decide whether Garrett was prejudiced by the District Court's failure to order production of the pictures at trial, since we are reversing Garrett's conviction on other grounds.

[10] Although petitioner Simmons objected at trial to the admission of Garrett's testimony, the claim was not pressed on his behalf here. Garrett did not mention Simmons in his testimony, and the District Court instructed the jury to consider the testimony only with reference to Garrett.

this Court long ago conferred upon defendants in federal prosecutions the right, upon motion and proof, to have excluded from trial evidence which had been secured by means of an unlawful search and seizure. *Weeks* v. *United States*, 232 U. S. 383. More recently, this Court has held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . . ." *Mapp* v. *Ohio*, 367 U. S. 643, 657.

However, we have also held that rights assured by the Fourth Amendment are personal rights, and that they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure. See, *e. g.*, *Jones* v. *United States*, 362 U. S. 257, 260–261. At one time, a defendant who wished to assert a Fourth Amendment objection was required to show that he was the owner or possessor of the seized property or that he had a possessory interest in the searched premises.[11] In part to avoid having to resolve the issue presented by this case, we relaxed those standing requirements in two alternative ways in *Jones* v. *United States*, *supra*. First, we held that when, as in *Jones*, possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence. Second, we held alternatively that the defendant need have no possessory interest in the searched premises in order to have standing; it is sufficient that he be legitimately on those premises when the search occurs. Throughout this case, petitioner Garrett has justifiably, and without challenge from the Government, proceeded on the assumption

[11] See, *e. g.*, *Jones* v. *United States*, 362 U. S. 257, at 262; Edwards, Standing To Suppress Unreasonably Seized Evidence, 47 Nw. U. L. Rev. 471 (1952).

that the standing requirements must be satisfied.[12] On that premise, he contends that testimony given by a defendant to meet such requirements should not be admissible against him at trial on the question of guilt or innocence. We agree.

Under the standing rules set out in *Jones*, there will be occasions, even in prosecutions for nonpossessory offenses, when a defendant's testimony will be needed to establish standing. This case serves as an example. Garrett evidently was not in Mrs. Mahon's house at the time his suitcase was seized from her basement. The only, or at least the most natural, way in which he could found standing to object to the admission of the suitcase was to testify that he was its owner.[13] Thus, his testimony is to be regarded as an integral part of his Fourth Amendment exclusion claim. Under the rule laid down by the courts below, he could give that testimony only by assuming the risk that the testimony would later be admitted against him at trial. Testimony of this kind, which links a defendant to evidence which the Government considers important enough to seize and to seek to have admitted at trial, must often be highly prejudicial to a defendant. This case again serves as an example, for Garrett's admitted ownership of a suitcase which

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[12] It has been suggested that the adoption of a "police-deterrent" rationale for the exclusionary rule, see *Linkletter* v. *Walker*, 381 U. S. 618, logically dictates that a defendant should be able to object to the admission against him of *any* unconstitutionally seized evidence. See Comment, Standing To Object to an Unreasonable Search and Seizure, 34 U. Chi. L. Rev. 342 (1967); Note, Standing To Object to an Unlawful Search and Seizure, 1965 Wash. U. L. Q. 488. However, that argument is not advanced in this case, and we do not consider it.

[13] The record shows that Mrs. Mahon, the owner of the premises from which the suitcase was taken, disclaimed all knowledge of its presence there and of its ownership.

only a few hours after the robbery was found to contain money wrappers taken from the victimized bank was undoubtedly a strong piece of evidence against him. Without his testimony, the Government might have found it hard to prove that he was the owner of the suitcase.[14]

The dilemma faced by defendants like Garrett is most extreme in prosecutions for possessory crimes, for then the testimony required for standing itself proves an element of the offense. We eliminated that Hobson's choice in *Jones* v. *United States, supra,* by relaxing the standing requirements. This Court has never considered squarely the question whether defendants charged with non-possessory crimes, like Garrett, are entitled to be relieved of their dilemma entirely.[15] The lower courts which have considered the matter, both before and after *Jones,* have with two exceptions agreed with the holdings of the courts below that the defendant's testimony may be admitted when, as here, the motion to suppress has failed.[16] The reasoning of some of these courts would seem to suggest that the testimony would be admissible

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[14] The Government concedes that there were no identifying marks on the outside of the suitcase. See Brief for the United States, p. 33.

[15] In *Jones,* the only reference to the subject was a statement that "[The defendant] has been faced . . . with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may is by no means an inevitable holding . . . ." 362 U. S., at 262.

[16] See *Heller* v. *United States,* 57 F. 2d 627; *Kaiser* v. *United States,* 60 F. 2d 410; *Fowler* v. *United States,* 239 F. 2d 93; *Monroe* v. *United States,* 320 F. 2d 277; *United States* v. *Taylor,* 326 F. 2d 277; *Airdo* v. *United States,* 380 F. 2d 103; *United States* v. *Lindsly,* 7 F. Supp. 247, rev'd on other grounds, 12 F. 2d 771. Contra, see *Bailey* v. *United States,* — U. S. App. D. C. —, — F. 2d —; *United States* v. *Lewis,* 270 F. Supp. 807, 810, n. 1 (dictum).

even if the motion to suppress had succeeded,[17] but the only court which has actually decided that question held that when the motion to suppress succeeds the testimony given in support of it is excludible as a "fruit" of the unlawful search.[18] The rationale for admitting the testimony when the motion fails has been that the testimony is voluntarily given and relevant, and that it is therefore entitled to admission on the same basis as any other prior testimony or admission of a party.[19]

It seems obvious that a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim. The likelihood of inhibition is greatest when the testimony is known to be admissible regardless of the outcome of the motion to suppress. But even in jurisdictions where the admissibility of the testimony depends upon the outcome of the motion, there will be a deterrent effect in those marginal cases in which it cannot be estimated with confidence whether the motion will succeed. Since search-and-seizure claims depend heavily upon their individual facts,[20] and since the law of search and seizure is in a state of flux,[21] the incidence of such marginal cases cannot be said to be negligible. In such circumstances, a defendant with a substantial claim for the exclusion of evidence may conclude that

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[17] See, *e. g.*, *Heller* v. *United States*, 57 F. 2d 627; *Monroe* v. *United States*, 320 F. 2d 277.

[18] See *Safarik* v. *United States*, 62 F. 2d 892, rehearing denied, 63 F. 2d 369. Accord, *Fowler* v. *United States*, 239 F. 2d 93 (dictum); cf. *Fabri* v. *United States*, 24 F. 2d 185.

[19] See cases cited in n. 16, *supra*.

[20] See, *e. g.*, *United States* v. *Rabinowitz*, 339 U. S. 56, 63.

[21] *E. g.*, compare *Warden* v. *Hayden*, 387 U. S. 294, with *Gouled* v. *United States*, 255 U. S. 298; compare *Camara* v. *Municipal Court*, 387 U. S. 523, with *Frank* v. *Maryland*, 359 U. S. 360.

the admission of the evidence, together with the Government's proof linking it to him, is preferable to risking the admission of his own testimony connecting himself with the seized evidence.

The rule adopted by the courts below does not merely impose upon a defendant a condition which may deter him from asserting a Fourth Amendment objection—it imposes a condition of a kind to which this Court has always been peculiarly sensitive. For a defendant who wishes to establish standing must do so at the risk that the words which he utters may later be used to incriminate him. Those courts which have allowed the admission of testimony given to establish standing have reasoned that there is no violation of the Fifth Amendment's Self-Incrimination Clause because the testimony was voluntary.[22] As an abstract matter, this may well be true. A defendant is "compelled" to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forgo a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit.[23] However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit.[24] When this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amend-

[22] See, *e. g.*, *Heller* v. *United States*, 57 F. 2d 627.

[23] For example, testimony given for his own benefit by a plaintiff in a civil suit is admissible against him in a subsequent criminal prosecution. See 4 J. Wigmore, Evidence § 1066 (1940); 8 *id.*, § 2276 (J. McNaughton rev. 1961).

[24] *Ibid.*

ment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.

For the foregoing reasons, we affirm the judgment of the Court of Appeals so far as it relates to petitioner Simmons. We reverse the judgment with respect to petitioner Garrett, and as to him remand the case to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 55.—October Term, 1967.

Thomas Earl Simmons et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March 18, 1968.]

Mr. Justice Black, concurring in part and dissenting in part.

I concur in affirmance of the conviction of Simmons but dissent from reversal of Garrett's conviction. I shall first discuss Simmons' case.

1. Simmons' chief claim is that his "pretrial identification [was] so unnecessarily suggestive and conducive to irreparable mistaken identification, that he was denied due process of Law." The Court rejects this contention. I agree with the Court but for quite different reasons. The Court's opinion rests on a lengthy discussion of inferences that the jury could have drawn from the evidence of identifying witnesses. A mere summary reading of the evidence as outlined by this Court shows that its discussion is concerned with the weight of the testimony given by the identifying witnesses. The weight of the evidence, however, is not a question for the Court but for the jury, and does not raise a due process issue. The due process question raised by Simmons is frivolous and should be deemed as such. The identifying witnesses were all present in the bank that was robbed when it was robbed and all saw the robbers. The due process contention revolves around the circumstances under which these witnesses identified pictures of the robbers shown to them, and these circumstances are relevant only to the weight the identification was

entitled to be given. The Court, however, considers Simmons' contention on the premise that a denial of due process could be found in the "totality of circumstances" of the picture identification. I do not believe the Due Process Clause or any other constitutional provision vests this Court with any such wide-ranging, uncontrollable power. A trial according to due process of law is a trial according to the "law of the land," laws enacted by the Constitution or the Legislative Branch of Government, and not "laws" formulated by the courts according to the "totality of the circumstances." Simmons' due process claim here should be denied because it is frivolous.* For these reasons I vote to affirm Simmons' conviction.

2. I agree with the Court, in part for reasons it assigns, that the District Court did not commit error in declining to permit the photographs used to be turned over to the defense for purposes of cross-examination.

3. The Court makes new law in reversing Garrett's conviction on the ground that it was error to allow the Government to use against him testimony he had given upon his unsuccessful motion to suppress evidence allegedly seized in violation of the Fourth Amendment. The testimony used was Garrett's statement in the suppression hearing that he was the owner of a suitcase which contained money wrappers taken from the bank that was robbed. The Court is certainly guilty of no overstatement in saying that this "was undoubtedly a strong piece of evidence against [Garrett]." *Ante*, p. 13. In fact, one might go further and say that this testimony,

*Although Simmons' "questions presented" raise no such contention, the Court declines to use its "supervisory power" to hold Simmons' rights were violated by the identification methods. One must look to the Constitution in vain, I think, to find a "supervisory power" in this Court to reverse cases like this on such a ground.

along with the statements of the eyewitnesses against him, showed beyond all question that Garrett was one of the bank robbers. The question then is whether the Government is barred from offering a truthful statement made by a defendant at a suppression hearing in order to prevent the defendant from winning an acquittal on the false premise that he is not the owner of the property he has already sworn that he owns. My answer to this question is "No." The Court's answer is "Yes" on the premise that "a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim." *Ante,* p. 14.

For the Court, though not for me, the question seems to be whether the disadvantages associated with deterring a defendant from testifying on a motion to suppress are significant enough to offset the advantages of permitting the Government to use such testimony when relevant and probative to help convict the defendant of a crime. The Court itself concedes, however, that the deterrent effect on which it relies comes into play, at most, only in "marginal cases" in which the defendant cannot estimate whether the motion to suppress will succeed. *Ante,* p. 14. The value of permitting the Government to use such testimony is, of course, so obvious that it is usually left unstated, but it should not for that reason be ignored. The standard of proof necessary to convict in a criminal case is high, and quite properly so, but for this reason highly probative evidence such as that involved here should not lightly be held inadmissible. For me the importance of bringing guilty criminals to book is a far more crucial consideration than the desirability of giving defendants every possible assistance in their attempts to invoke an evidentiary rule which itself can result in the exclusion of highly relevant evidence.

This leaves for me only the possible contention that Garrett's testimony was inadmissible under the Fifth Amendment because it was compelled. Of course, I could never accept the Court's statement that "testimony is not always involuntary as a matter of law simply because it it is given to obtain a benefit." *Ante*, p. 15. No matter what Professor Wigmore may have thought about the subject, it has always been clear to me that any threat of harm or promise of benefit is sufficient to render a defendant's statement involuntary. See *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341, 367 (1963) (dissenting opinion). The reason why the Fifth Amendment poses no bar to acceptance of Garrett's testimony is not, therefore, that a promise of benefit is not generally fatal. Rather, the answer is that the privilege against self-incrimination has always been considered a privilege that can be waived, and the validity of the waiver is, of course, not undermined by the inevitable fact that by testifying, a defendant can obtain the "benefit" of a chance to help his own case by the testimony he gives. When Garrett took the stand at the suppression hearing, he validly surrendered his privilege with respect to the statements he actually made at that time, and since these statements were therefore not "compelled," they could be used against him for any subsequent purpose.

The consequence of the Court's holding, it seems to me, is that defendants are encouraged to come into court, either in person or through other witnesses, and swear falsely that they do not own property, knowing at the very moment they do so that they have already sworn precisely the opposite in a prior court proceeding. This is but to permit lawless people to play ducks and drakes with the basic principles of the administration of criminal law.

There is certainly no language in the Fourth Amendment which gives support to any such device to hobble

law enforcement in this country. While our Constitution does provide procedural safeguards to protect defendants from arbitrary convictions, that governmental charter holds out no promises to stultify justice by erecting barriers to the admissibility of relevant evidence voluntarily given in a court of justice. Under the first principles of ethics and morality a defendant who secures a court order by telling the truth should not be allowed to seek a court advantage later based on a premise directly opposite to his prior solemn judicial oath. This Court should not lend the prestige of its high name to such a justice-defeating strategem. I would affirm Garrett's conviction.

SUPREME COURT OF THE UNITED STATES

No. 55.—October Term, 1967.

Thomas Earl Simmons et al., Petitioners, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March 18, 1968.]

Mr. Justice White, concurring in part and dissenting in part.

I concur in Parts I and II of the Court's opinion but dissent from the reversal of Garrett's conviction substantially for the reasons given by Mr. Justice Black in his separate opinion.